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CONVEYANCER'S NOTEBOOK

Conditions of Sale.—New editions of the *National Conditions of Sale* and of the Law Society's *Conditions of Sale* have been issued to deal with the Town and Country Planning Act, 1947. They proceed on similar lines, but are not identical. The method adopted is a special and elaborate clause to deal with the Act and a modification of the form of the Particulars of Sale, so that a specification of the " existing use " may, but not necessarily will, be included. The learned editors of both sets of conditions clearly assume that the existing use is not a matter of title, but the conditions provide for full answers to be given to any requisitions made on the point, so far as the vendor has information " in his possession and power ", and for a covenant to provide information after the date of conveyance. The Law Society's conditions also provide for a statutory declaration concerning the " permitted " use so far as the information is in the possession and power of the vendor. The national conditions enable the vendor to rescind the contract, if the purchaser insists on a requisition on this point, but there is no similar provision in the Law Society's conditions, and as requisitions on title and requisitions on " use " seem to be distinguished *probably* a vendor could not rescind under the Law Society's conditions. Both conditions enable a purchaser to rescind if before completion he discovers that the " specified " use is not the " permitted " use, but this will only apply, of course, where the use is specified. Subject to all this the purchaser is deemed to accept the use of the property to be the permitted use.

With regard to charges, restrictions, etc., the conditions proceed on the basis that the vendor must disclose any of which he knows and subject to this that the purchaser takes subject to all such obligations. This, of course, follows the same principle as the clause relating to easements, etc., and no doubt, should the question arise, will be similarly construed with regard to the obligations of vendor and purchaser. The Law Society's conditions are careful to exclude registration as constituting knowledge in the vendor. The importance of this point being that nearly all of these obligations, if not all, will be capable of registration, mostly as local land charges but not all.

These conditions represent the current confusion into which conveyancers find themselves plunged. Coupled with an unwillingness to recognise that the Act has altered the character of land ownership there is an acknowledgment that the changed position may be of paramount importance to purchasers. At the same time it is felt that at least the whole burden should not be put upon the vendor. With this view some sympathy can be expressed since, at least in some cases, a vendor may be far from certain what is the permitted use. A simple illustration can be taken from requisitioned property, where the actual use on the appointed day did not coincide with the use before requisition. Section 76 (2) of the Act does not apply where there was no planning permission granted. Section 12 (5) refers to " temporary " use, and different views concerning what is " temporary " have been expressed. At the same time the difficulty, which may exist in individual cases, does not seem sufficient to justify a general practice of leaving the purchaser " to take the knock ".

It seems clear enough that both sets of conditions contemplate no mention of the " use " in the conveyance, and at least so far as this is concerned that the covenants for title do not apply. Whether an enforcement notice served under section 23 after completion in respect of the use existing at completion would constitute a breach of the covenant for title in such circumstances remains to be seen. In the new edition of *Emmet on Title* it is suggested (at p. 528) that this would be the case (*a*), notwithstanding that the learned editor does not think that the use is a matter of title (see p. 152). At the same time he (at p. 45) suggests that the contract might, where the use is specified in the contract, include a stipulation for extending the covenants for title (see *ante*, p. 502, for precedent). This point is not dealt with in either of the sets of conditions under discussion. In our view the covenants for title can only benefit the purchaser if the use is specified in the conveyance. On the other hand the obligations registrable as land charges would be " incumbrances " and problems concerning them may arise, unless the conveyance is expressly made subject to them, on the ground that even if not made or occasioned by the vendor, they were " suffered " by him.

The conditions also contain provisions for assignment of " development value " and for a covenant to obtain any necessary assistance from the vendor.

Removal of Land Charges and Agricultural Credits Departments.— With the approval of the Lord Chancellor the Chief Land Registrar has informed the Council of the Law Society that the Land Charges and Agricultural Credits Departments were removed from the Land Registry in Lincoln's Inn Fields, London, W.C.2, to Station Approach Buildings, Station Approach, Kidbrooke, London, S.E.3, on March 5, 1949. On and after March 7, 1949, all communications relating to those departments should be addressed to the Superintendent, Land Charges and Agricultural Credits Departments, Station Approach

(*a*) This may be more or less irrelevant, because if the contravention was instituted by the vendor he would be liable under s. 24 (2). If it was not, could he be liable anyhow?

Buildings, Station Approach, Kidbrooke, London, S.E.3, where in future all registrations and searches in those departments will be conducted. Registration of title under the Land Registration Acts will continue to be conducted at H.M. Land Registry, Lincoln's Inn Fields, W.C.2, as hitherto.

Inquiries of Local Authorities.—The Law Society have arranged with local government bodies on a form of additional inquiries to accompany local land charge searches. The form is published by the Solicitors' Law Stationery Society; but so far no forms have been agreed for the L.C.C. and metropolitan boroughs. There are three separate forms, namely, for county council, county borough, and borough or district councils. Although a number of the inquiries relate to town planning they also include such matters as sewers and highways.

These additional inquiries, if answered correctly, should together with the search cover pretty well all the obligations in force against the property under the Town Planning Act and similar statutory impositions. They will not, however, necessarily determine the "use" which is the permitted use. It is obvious that no conveyancer should dispense with them although, as we point out below, his present position in connection with such matters is obscure.

Duty to make preliminary inquiries.—A learned correspondent writes:—We find that although the 1925 property legislation has to some extent simplified conveyancing practice, apart from the difficulties one expects to find on the making of important changes in the law, yet the work of the conveyancer seems to have been increased by reason of the investigations and inquiries one has to make prior to entering into contracts, mainly by reason of the Town and Country Planning Act, 1947. In other words, the work of investigation of title has been somewhat simplified, but work prior to contract and in connection with the drawing and settling of contract has vastly increased. This brings us to two points:—

1. What is the duty of a solicitor acting for a purchaser of land. Is it merely to obtain the fee simple free from incumbrances (or other legal estate as the case may be) for the purchaser, or must the solicitor be responsible for advising as to permitted user of the land and similar matters, and is he liable in negligence if he does not make inquiries as to permitted user, risk of compulsory purchase, etc.?

2. Do the scale conveyancing costs cover the increasing work that has to be done prior to contract? This is particularly important in the case of purchases of bare land, as if land is bought at present user value the price in our town is likely to be about £10 or £20 for a building plot, as against £500 or more previously so that the scale costs are really insufficient to cover the work prior to contract.

The first query in this letter presents us with the problem in a different form, whether or not the vendor is selling a fee in the "land" or in the "use". As has been pointed out the Law Society prefers

to think that he sells a fee in the " land ". If this really is so there could be an argument that it is no business of the solicitor to make inquiries concerning the " use " or liability to other restrictions not amounting to title.

There is very little case law on the duty of care owed by solicitors in conveyancing matters and that is not recent. It is generally laid down in respect of investigation of title deeds and making *customary* searches : see *Cooper* v. *Stephenson* (1852), 21 L. J. Q. B. 292. So far as planning matters are brought within the scope of the Land Charges Act searches must be made, but this does not cover the main question of " use ".

In our view investigation of the " use " is essential because we still hold to the view that " use " is a question of title. Assuming that it is not the problem becomes more intricate, at least in theory. If the " use " is not specified in the contract the *logical* view would be that no question can arise on the sale, because a purchaser must take what the vendor is selling, no more and no less. No mention of the use will appear in the conveyance and there would be nothing to investigate. If the " use " is specified in the contract there would seem to be good ground for supposing that inquiries should be made. The point is not quite as simple as that. If, prior to the appointed day, the particulars of sale had stated that the premises were suitable for business purposes to what extent, if at all, would a solicitor be regarded as under an obligation to satisfy himself that the premises could be so used? We think that he would be under an obligation to make the " usual inquiries " and no more.

This brings out the amorphous character of the provisions contained in the conditions of sale which we have considered above. In our view, whether or not such a condition is commonly employed, and we think it will be, the solicitor will not make less inquiries than the contract envisages. If this practice is adopted the gap between those who think the matter a question of title and those who do not will be pretty narrow except in theory. Cases will no doubt emerge in which the distinction becomes important and we may hope that it will then be settled at someone's expense, unless, as we hope, the Legislature itself fills the gap which it has made.

We speak with reserve concerning the question of costs. Nevertheless, if it is the duty of the solicitor to make these inquiries they must fall within the scale fee and we do not see how else the matter may be dealt with, since the investigation is incidental to the transaction. We should be interested to learn the views of subscribers on the issue here raised.

Indemnity against restrictive covenants on conveyance.—Another learned correspondent writes as follows :—

We should be interested to have your opinion upon the following point : Clients of ours have recently entered into a contract to purchase a freehold dwelling-house and one of the clauses of the contract is as follows :—

" The Purchasers shall enter into the usual qualified covenant

for observance and performance of the covenants and restrictions affecting the property and for indemnity ".

In our draft conveyance we submitted the following clause in respect of the above provision in the contract :—

> " The Company by way of indemnity only [and to the intent that this covenant shall be binding so far as may be on the owner for the time being of the hereditaments hereby conveyed but upon the company only as long as it is the owner of the same] hereby covenants with the Vendor that the Company and its successors in title will at all times hereafter observe and perform the said covenants and restrictions contained or referred to in the said Conveyance so far as the same are still subsisting and capable of taking effect and will at all times save harmless and keep indemnified the Vendor and her estate from and against all proceedings costs claims expenses and liabilities whatsoever in respect of any breach thereof."

The vendor's solicitors have, however, deleted the portion which is printed in square brackets.

As a matter of interest, we should be glad to know if you consider that the vendor's solicitors were entitled to insist upon the deletion of these words having regard to the wording of the clause in the contract?

One of the difficulties that face conveyancers is that of giving effect to words inserted in a contract which are not well settled as common form. This particularly applies to the use of such words as " usual covenants ". In an open contract to grant leases, for example, these words have been litigated a number of times and their content is now reasonably well settled, though it may still be regarded as a matter of fact : see *Flexman* v. *Corbett*, [1930] 1 Ch. 672. We know of no case which settles the particular issue raised by our learned correspondent, but following the principle laid down in *Flexman* v. *Corbett* (*supra*), and consulting the precedent books we should say that it is usual to exclude the words deleted. There seems to be good ground for this in the character of the covenant. The vendor remains liable on his personal covenant to the covenantee in damages notwithstanding that he has parted with all interest in the land. On the other hand the purchaser ceases to be bound by the restrictive covenants so soon as he parts with the land.

Description of property and use.—Another learned correspondent writes :—

Dr. Harold Potter's view that a land owner has only a fee simple in the right to use his property in a particular way leads us to suppose that property will not be sufficiently described in an " open contract " if the use is not mentioned. Do you agree?

The answer to this question depends upon what is meant by " sufficiently described ". If all that is meant is " sufficiently " to enforce the contract by an action for specific performance we should say that it is not necessary to describe the use. Very vague descriptions have been held to be sufficient since oral evidence may be given to explain

it : see *Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90 ; *Auerbach* v. *Nelson*, [1919] 2 Ch. 383.

The difficulty that may have to be faced where a description of the use is omitted is what, if any, particular use is agreed to be sold. Thus, if the actual use at the date of contract is a " temporary " use and can not be continued indefinitely (see section 76 (1) (2) of the Town and Country Planning Act, 1947), the question *may* arise whether the purchaser can refuse to complete on the ground that if the use is not specified the apparent use is what the vendor contracts to sell. This matter can only be determined when the cases come before the Court.

RULE IN *ALLHUSEN* v. *WHITTELL*

A correspondent has raised a question as to the necessity for the exclusion of the rule in *Allhusen* v. *Whittell* in Form 4 in the December issue of the *Conveyancer* (p. 516).

The rule applies only where the residue is limited to persons in succession, but in the above Precedent a life interest in one moiety is given to the husband and the rule would therefore apply. The rule is designed to ensure that the successive enjoyment should be an enjoyment of the same fund, and for effecting that result the Court is bound to enter into a sort of equitable bookkeeping or adjustment (*Re McEuen*, [1913] 2 Ch. 704).

The rule requires that the debts, funeral and testamentary expenses and legacies are to be paid out of so much of the capital of the estate as with the income on such part for the first year after the death will be sufficient to provide for these liabilities.

This part of the capital never becomes part of the residue at all, and consequently the tenant for life's income is constant. But even when the rule is not expressly excluded it is not to be applied slavishly, and in some cases it would produce obvious injustice. This may be so, *e.g.*, if large sums have to be expended by the executors early in the first year. There may (as was suggested in *Re McEuen*, *supra*) be more equitable methods of bookkeeping which will give fair rights to both tenant for life and remainderman, and in some cases rough and ready methods, such as applying a particular asset with interest up to date in payment of a particular liability may be justified, or as in *Re Wills*, [1915] 1 Ch. 769, estate duty may be paid out of capital and interest thereon out of income.

The rule is, it is believed, frequently ignored in the administration of small estates, and it is often thought better to exclude it and leave the executors to work out the adjustment in the best way they can without binding them to follow elaborate calculations. Further, in the Form referred to it is desirable to have as much income as possible immediately available for maintenance of the children.

The same correspondent refers to Form 22 in Vol. 3 (p. 522), and suggests that where it is used in combination with Form 13 in Vol. 2 (p. 416) and the wife dies twenty-nine days after the husband, a child dying after the husband but before the wife would take a vested interest. This of course is so, and it is a point to be considered in drafting wills

with alternative provisions in the event of the wife not surviving the husband for a month, *e.g.*, Form 6 in the December issue of the *Conveyancer* (p. 521). The risk, however, is small; and even if the event happened, the share would generally go back under the wife's will or intestacy to the surviving children.

If desired, the alternative trusts may make the children's shares vest at the death of the survivor of the husband and wife; but this again may lead to difficulties as the case provided for by such a form of will is the uncertainty of the precise date of the wife's death, particularly if she died abroad.

E. H. B.

Town and Country Planning—Amendment of General Development Order.—By the Town and Country Planning (General Development) Amendment Order, 1949 (SI 195/1949) we begin the amendments of practice and substantive law that are to be expected. This amendment, in particular, relates to procedure for a determination whether or not a planning permission is necessary. It is suspected that many more of these have arisen than was anticipated. It is important to note that appeals must be made within one month, and in effect failure to receive a planning determination within two months of application constitutes refusal.

The most significant thing about these amendments, however, is the amendments to the Schedule of permitted developments. For example, it is permitted to change from use as a restaurant to use as a shop, not, be it noted, the converse. The rules governing " temporary uses " have been reframed. The point is that this probably is only a swallow heralding the spring. As experience grows so other amendments are to be expected. It is the essential fluidity of those Orders that make their importance so great. It should also be observed that this Order though it may permit a development does not exempt from development charge. Although a development charge is only payable where planning permission is required this Order constitutes the planning permission. In order that the development shall not be liable to development charge it must fall within the Development Charge Exemption Regulations, which, of course, can equally be changed or modified from time to time and need not coincide with the General Development Order.

Town and Country Planning—Central Land Board and Development Charges.—Just as we were going to press *Practice Notes* (First Series) (*a*) were issued by the Central Land Board. All solicitors concerned with land should obtain a copy. It deals with the cases in which development charge is payable, the procedure to obtain a determination of the amount of the charge, and the methods of assessment of the charge. It also contains a warning against purchases of land at more than " existing use value ". There are three reasons given for purchasing at existing use value only and they are :

(*a*) London : H.M. Stationery Office, 1s. net.

(i) no compensation is usually payable for refusal of a planning permission;

(ii) in assessing development charge the actual price paid will not be a reason for a lower charge;

(iii) most compulsory purchases will be at existing use value.

Reasons (i) and (iii) are vital to all persons. We fear that the only effect of reason (ii) will be to increase the value not only of the building erected but all buildings of a similar type so long as buildings remain in short supply.

The analysis of the cases in which development charge is payable sets out systematically the provisions of the Act and Orders so that in conjunction with the Index the practitioner should be able to track down any ordinary case. It should be noted that the Practice Notes deal with development charge and not with planning permission as such (since that is a matter for the planning authorities and not the Central Land Board). It does not follow inevitably, though it does usually, that where development charge is payable a planning permission is necessary and conversely. Secondly, it should be observed that the question of whether or not a development charge is payable is a matter of law determinable partly by the Act and partly by the Regulations. The Regulations can, of course, be changed, but the Act is static and the Central Land Board's view of the meaning of the Act *may* be wrong. For example, on p. 4 with regard to the meaning of "*material* change of use" the pamphlet quotes a Ministry circular. This circular has no more authority on this point than the pamphlet. Among other things it says: "a change in kind will always be material." It goes on to distinguish between taking in lodgers and a "declared guest house, boarding house or private hotel." It is respectfully suggested that what constitutes a material change of use is a question for the Courts and that it may prove that a change in kind may not, in fact, necessarily be material. The Act does not define to what the change has to be "material". The Ministry's view that "material" means "substantially different from the old" does not appear to be capable of determination. For example, it *could* be interpreted to mean only a change of use which would have a material effect upon the locality which all changes of use, even different in kind, might affect. So, for example, the Ministry's supposition that light and heavy industrial buildings are not interchangeable might in some circumstances prove to be unfounded. It must be borne in mind that change of use may carry a development charge without any structural changes at all. Hence this question may be fought as it may involve considerable sums, *e.g.*, change of flats into business premises. This would be a material change within the view of the Ministry, but it might be quite immaterial to the planning of the locality.

Nevertheless, unless and until some more authoritative view is given of the cases in which development charge is payable land owners and intending purchasers should be careful to observe the list given in this pamphlet which in any event is much too long to print.

It may be worth noting that the Board contemplates that the charge will normally be payable before the commencement of development. It has not yet had sufficient experience to say in what exceptional cases it will be payable by instalments. Where it is so payable the payments

will normally be secured " by a charge or otherwise " and carry interest at the commercial rate. Although the Act provides for a variety of methods of payment by instalment (section 71 (1)); in fact the Board will prefer a series of instalments of capital.

There is also the problem of " value ". The Act does lay down a principle, namely, that the charge is the difference between the value of the land with and without the consent to development. Although this principle is laid down there appears to be no way of enforcing it—in fact the Board has something to sell and if the purchaser does not like the price he can do without it. Consequently, Parts II and III (pp. 11–29), which set out the considerations by which development charge will be determined are of the greatest importance. They are not, however, legal issues but factual issues. It seems clear, however, that rating cases are likely to play a part in providing a basis for assessment, as, for example, in the proposition that " value " can exist without pecuniary profit. And, indeed, the pamphlet says (at p. 14) : " the skill of surveyors and others in the past has produced in rating practice many new methods . . . which are now part of the ' normal processes of valuation ' for rating. It is likely that such skill has still scope for new ideas in framing new ' processes of valuation ' which will in due course become ' normal ' for development charges." No practitioner can afford to be without this pamphlet.

CORRIGENDA

Form 12, p. 528 (December, 1948, issue).
Clause 2, sidenote—*for* " term " *read* " time ".
Clause 5, sidenote—*for* " user " *read* " use ".
Clause 6, lines 4, 7 and 15, *for* " user " *read* " use ";
line 7, *for* " operation " *read* " development ".

THE LANDLORD AND TENANT (RENT CONTROL) BILL

By J. Muir Watt, M.A., Barrister-at-Law

" That welter of chaotic verbiage which may be cited together as the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939 " (*a*), is about to be increased by yet another statute which modifies portions of the structure of rent control. The improvement in the form of this legislation which the 1945 Ridley Committee regarded as " urgently necessary " seems to be as far off as ever. That Committee were unanimously of the opinion that " it is urgently necessary that the present chaos of overlapping statutes should be replaced by a single comprehensive Act in which the whole law relating to rent control should

(*a*) [1945] K. B. 401.

be clearly set out " (*b*). At the time of their Report there were on the statute book, wholly or partly in force, no less than nine Acts dealing with rent restriction. Since then the Furnished Houses (Rent Control) Act, 1946, has been passed. The present Bill amends both the " principal Acts " (*c*) and the 1946 Act. The law, therefore, which affects millions of dwelling-houses and touches the daily lives of the majority of the inhabitants of this country will soon be embodied in the obscure and complicated provisions of eleven Acts of Parliament scattered over a period of nearly thirty years.

Amendment must precede consolidation. A certain confusion of thought can be detected in the complaints of some critics who have said that the present Bill ought to have been a comprehensive *consolidating* measure. This is a misconception. The real criticism, from the point of view of the law reformer, which can be fairly levelled at the present Bill is that it selects for amendment only a few special points. The comprehensive *amendment* of this branch of the law, which must pave the way for consolidation, is still postponed.

It is a matter of some difficulty to write about a Bill which is still in the course of taking shape during its passage through Parliament. Some fairly important alterations to the Bill have already been made in the Committee stage in the House of Commons. The present article describes the Bill in the form in which it has emerged from Committee. Attention has, however, been called to one or two amendments which have subsequently appeared on the Order Paper in the name of the Minister of Health and which will probably be incorporated in the Bill on Report.

The Bill may be said to fall into four parts and will be so dealt with in this article. These are as follows :—

1. Special provisions as to variation of rents, and as to the adjustment of rents where premiums have been taken, in the case of lettings made for the first time since September 1, 1939.
2. The prohibition of premiums generally on the grant or assignment of tenancies.
3. New provisions where accommodation is shared.
4. Amendments of the Furnished Houses (Rent Control) Act, 1946.

1. LETTINGS MADE SINCE SEPTEMBER 1, 1939

Determination of " Reasonable Rent "

The provisions contained in clauses 1 and 2, relating to the variation of standard rents and the adjustment of rents where premiums have been paid apply to dwelling-houses let for the first time since September 1, 1939. Under the present law the standard rent in the case of such lettings is determined by and is the actual rent at which the dwelling-house is first let. Ignoring for the moment the restrictions which may be imposed on the rent of houses newly constructed under building licences by virtue of section 7 of the Building Materials and Housing Act, 1945, the landlord is free to charge what rent he pleases on such a first letting. The idea behind the provisions contained in clauses 1 and 2 of the Bill is that in a number of cases landlords made unfair use

(*b*) Cmd. 6621, para. 31.
(*c*) The Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.

of their strong bargaining position in the war and post-war years and charged unreasonable rents and heavy premiums. The Bill enables such contracts to be re-opened, the rents reduced and the premiums, or part of them, recovered by a special procedure.

This part of the Bill has been attacked as being retrospective. In one sense it is. It is retrospective in the sense that it enables contracts made at any time since September 1, 1939, to be re-opened. It is not, however, retrospective in the sense of requiring payments of " unreasonable " rent made in the past to be repaid or any part of the premium which may be said to be apportionable to past years to be recovered.

Clause 1 enables either the landlord or the tenant to apply to the Tribunal (which is to be the Tribunal constituted under, or a Tribunal constituted in accordance with, the Furnished Houses (Rent Control) Act, 1946) to determine what is the reasonable rent in any case where the standard rent is determined by and is the rent at which the dwelling-house is let on a letting beginning after September 1, 1939. The wording of clause 1 (1) is not ideal, and it has been suggested by a critic of the Bill that it might apply to a standard rent established far in the past provided that the dwelling-house had been re-let at that same rent after the material date. This criticism is not, it is submitted, well-founded, but the clause could certainly have been clearer.

Although an application can be made to the Tribunal by either the landlord or the tenant, the result of an application to the Tribunal can only be a reduction, not an increase, of rent. It is apparently possible for the Tribunal to *determine* that the reasonable rent is higher than the existing standard rent, but such a determination would be nugatory. It is only where the rent determined by the Tribunal is *less* than the existing standard rent that the rent is altered; in that case the reduced rent which the Tribunal consider reasonable becomes the new standard rent from the date of the determination. It may be asked, What is the point of permitting the landlord to apply if the rent cannot be increased? The answer presumably is that it affords the landlord an opportunity by which he can reassure himself as to the rent which ought to be charged, and it may be useful if he is contemplating a sale or requires a valuation.

Where the existing recoverable rent consists of the standard rent plus permitted increases the Tribunal is directed to determine the amount by which the recoverable rent exceeds the standard rent. This amount must then be deducted from the reasonable rent as determined under clause 1 (1). If the reasonable rent after this deduction is made from it is less than the existing standard rent it becomes the new standard rent. Clause 1 does not expressly say that the permitted increases are to be added back to constitute the new recoverable rent, but this may be taken to follow automatically from the present law. In another context, clause 2 (5), express provision is to be found for the inclusion in the amount of rent recoverable of permitted increases in respect of matters arising *after* the Tribunal's determination.

An amendment which is being moved by the Minister of Health at the Report stage makes it clear that an application cannot be made under clause 1 where the rent is subject to the limitation contained in section 7 of the Building Materials and Housing Act, 1945. It may also be noted that the registered rent of accommodation made available

under the provisions of Defence Regulation 68CB is already protected by paragraph (6) of that Regulation from being treated as the standard rent, so that clause 1 (1) would also be inapplicable in such a case.

No specific instructions are given to the Tribunals as to the factors to be considered in determining the reasonable rent. Clause 1 (4) provides :—

> "Subject to the provisions of this and the next following section, the rent which is reasonable for a dwelling-house shall, for the purposes of this section, be the rent which is in all the circumstances reasonable on a letting of that dwelling-house on the terms and conditions, other than terms and conditions fixing the amount of rent, on which the dwelling-house is let to the tenant making the application".

It remains to be seen what factors the Tribunals will take into account. It is probable that considerable divergences of principle and practice will arise between different Tribunals. Factors which might be regarded as relevant are the standard rents of similar properties in the neighbourhood (but this ignores differences of building costs at different times), the capital value of the dwelling-house, the expenditure by the landlord on the dwelling-house, the rates payable, the services in fact provided by the landlord, and the respective liabilities of landlord and tenant to repair. Clause 1 (4) as drafted might even be regarded as enabling the Tribunal to take into account the individual circumstances of the tenant, but it is submitted that this is an incorrect interpretation and that the criterion of reasonableness must be an objective one.

Adjustment of Rents where Premiums have been Paid

It is important, to avoid confusion, to grasp that the provisions of clause 2, which enable rents to be adjusted where premiums have been paid, apply only to cases where an application has been made to the Tribunal under clause 1 to determine the reasonable rent. Such an application, as has been seen, can only be made where the dwelling-house has been let for the first time since September 1, 1939. The provisions in clause 2, which afford additional relief to tenants whose tenancies were negotiated during the disturbed market conditions from 1939 onwards, must be sharply distinguished from the general provisions as to premiums contained in clause 3, which are examined below. Further, it must be appreciated that the provisions of clause 2 will only apply to premiums which have been paid before the commencement of the Act. Premiums subsequently paid will be subject to the new provisions contained in clause 3.

The machinery of clause 2 is to enable premiums paid in respect of the grant, continuance or renewal of a tenancy of the dwelling-house, to which the application to the Tribunal under clause 1 relates, to be recovered by means of a deduction from the reasonable rent determined by the Tribunal. The premium is deemed to be spread out over a period beginning with the commencement of the term in respect of which the premium was paid. In so far as part of that term has already elapsed before the application to the Tribunal the portion of the premium attributable to that part is not recoverable under this clause; in that sense the clause is not retrospective.

Before examining more closely some of the features of this clause

it is as well to make it clear to what premiums the clause applies. There has been some misunderstanding on this point. The clause applies both to premiums which are already illegal under the existing law and to premiums in respect of a term of fourteen years or upwards which are perfectly legal under the existing law. It may seem odd to lump together legal and illegal premiums, but it is intelligible when the purpose of the clause is borne in mind. It is part of the mechanism for re-opening unfair bargains which, the argument runs, the unfavourable market conditions from 1939 onwards enabled landlords to force upon tenants. A lawful premium may be part and parcel of an unreasonable bargain. Indeed, the power to re-open the question of rents in these cases would have been rather useless without power to examine premiums, even if lawfully received.

It is to be noted that the Tribunal will only deal with this question of premium if the tenant requires them to do so. If they do deal with it the tenant loses any right he may have had to recover the premium otherwise than by the machinery provided by the section. The tenant may prefer, in a case where an illegal premium was exacted, to rely on his rights under section 8 of the 1920 Act. By doing so he may be able to recover the whole amount of the premium paid, whereas under clause 2 he may only be able to recover a portion by deduction if some time has elapsed since the commencement of the term in respect of which it was paid.

Clause 2 directs the Tribunal, if the tenant so requires, to determine the "rental equivalent" of the premium. The expression "rental equivalent" is defined in clause 2 (2) in the following slightly complicated manner :—

> "the expression 'rental equivalent' means the amount of the premium, or of so much thereof as at the time of the Tribunal's determination has not been repaid or recovered, divided by the number of rent-periods between the commencement of the term, or of the continuance or renewal of a term, in respect of which the premium was paid, and the following date (in this section referred to as the 'relevant date'), that is to say—(a) where the term is a term of years certain current when the application to the Tribunal is made, being a term exceeding seven years, or the continuance or renewal was for such a term of years certain, the date of the expiration of that term of years certain; (b) in any other case, the date of the expiration of seven years from the commencement of the term, or of the continuance or renewal of a term, in respect of which the premium was paid".

The expression "rent period" means the period (whether weekly, monthly, annual or other) for which payments of rent are made. To take a simple illustration of the above provisions, suppose a premium of £1,500 were paid in respect of the grant of a tenancy for fifteen years. The rent is payable annually. The rental equivalent is £$1\frac{5}{1}\frac{0}{5}\frac{0}{0}$, *i.e.*, £100. The position then is that if the Tribunal make their determination five years after the commencement of the term, the tenant will pay, during the succeeding ten years, the reasonable rent minus £100 a year. There is a special provision for extending the "spread-over" period beyond that set out in the above-quoted passage if the rental equivalent would otherwise exceed the reasonable rent.

It is important to observe that nothing in clause 2 has the effect of extending any contractual tenancy beyond its normal term. If, however, a contractual tenancy is determined before the end of the relevant period allowed for the deduction of the rental equivalent, and the tenant remains in possession as a statutory tenant, he can continue to make this deduction until the relevant date. The right to make the deduction passes to a subsequent tenant who takes over the tenancy. If, however, before the relevant date *a fresh tenancy* is granted to a new tenant the right of deduction ceases.

An obvious criticism of these provisions as they stand, and one which has been made both in the House of Commons and outside, is that they would penalise a landlord to whom the reversion was assigned after the premium was paid. The premium was paid, not to him, but to his predecessor in title. At the time of writing the Minister of Health has tabled a new clause the effect of which is to obviate this injustice and to provide that the tenant shall have a right of recovery against the person who actually received the premium, not against the present landlord.

2. Prohibition of Premiums on the Grant or Assignment of Tenancies

The main effect of clause 2 is to make illegal certain types of premiums which have not hitherto been illegal, namely, (1) premiums paid on the grant, renewal or continuance for a period of fourteen years or upwards, and (2) premiums paid on the *assignment* of contractual tenancies. As at present worded, sub-section (3) of this clause, which defines its scope, appears to be defectively drafted. It reads as follows :—

> " (3) This section applies to any tenancy of a dwelling-house such that when the dwelling-house is let under the tenancy it is a dwelling-house to which the principal Acts apply ".

This sub-section does not at present say that the *tenancy* must itself be one to which the principal Acts apply. It could be argued, on this wording, that the clause applied to tenancies of dwelling-houses within the Acts although the tenancies were at rents of less than two-thirds the rateable value. This would be equivalent to saying that the clause prohibits the sale of ground leases of dwelling-houses to which the Acts apply. This drafting defect has, however, apparently been under consideration by the Government, because there is now a proposed amendment on the Order Paper, to be moved at the Report stage, which provides for the addition of the words—" being a tenancy to which the principal Acts apply " after " dwelling-house " where it first occurs in the above sub-section.

There is not space here to deal in detail with clause 3. It may be noted, however, that where before the commencement of the Act which will result from the present Bill a premium has been paid for the grant, continuance or renewal of a term for fourteen years or upwards (*i.e.*, a lawful premium), there is a provision enabling the assignor of the tenancy to collect from the assignee a proportionate part of that premium, notwithstanding the general prohibition of premiums on assignments.

It has been generally agreed that the power of contractual tenants

to require premiums on assignment has been a serious abuse of the protection afforded by the Rent Restrictions Acts. As regards the prohibition of all premiums on the grant, continuance or renewal of tenancies, it may be recalled that the Ridley Committee recommended that the exception in regard to terms for fourteen years or more should be abolished and that the complete ban in force before 1920 should be reimposed. This has now been done.

Clause 4 brings the provisions relating to the payment of excessive prices of furniture into line with the extended prohibition of premiums, and provides for a fine if the price demanded is not, at the request of the person on whom the demand is made, stated in writing.

A new clause, which is to be moved at the Report stage, prohibits premiums on the grant, renewal, continuance *or assignment* of rights under a contract to which the Furnished Houses (Rent Control) Act, 1946, applies.

There are special provisions as to apportionment where standard rents have been determined under clause 1.

3. New Provisions Where Accommodation is Shared

It is well known that as a result of the *Neale* v. *Del Soto*, [1945] K. B. 144 line of decisions it has been held that the sharing of living accommodation with the landlord deprived the tenant of the protection of the Rent Restrictions Acts. The cases of *Banks* v. *Cope-Brown*, [1948] 2 All E. R. 76, and *Llewellyn* v. *Hinson*, [1948] 2 K. B. 385, made it clear that a tenant similarly lost the protection of the Acts if the living accommodation was shared with another tenant or tenants, even if there was no sharing with the landlord. There is no doubt that these decisions have caused a considerable amount of alarm and despondency among tenants, and it was inevitable that the Legislature would intervene. The Bill adopts different solutions according to whether the living accommodation is shared by the tenant with the landlord (whether with or without other persons) or is shared with other persons but not with the landlord. If the sharing is with the landlord it is provided that the Furnished Houses (Rent Control) Act, 1946, will apply, notwithstanding that the rent does not include payment for the use of furniture or for services. Thus the tenant will in this case have the protection as regards rent and the limited security of tenure (which is, however, considerably extended by the present Bill) which the 1946 Act affords. If, however, the sharing is with a person or persons other than the landlord the full protection of the principal Acts is given. The reason for this difference of treatment is that it is feared that to apply the principal Acts where the sharing is with the landlord might have the effect of discouraging landlords from letting, thus aggravating the shortage of accommodation.

The present clause 9, which deals with the case of sharing with persons other than the landlord is not free from difficulties. Sub-sections (4), (6) and (7) are far from easy to reconcile in all respects. These sub-sections deal with the effects of variations in the tenant's rights to the use of the shared accommodation. It is obvious, for example, that the identity of the persons with whom the tenant shares accommodation may change and their numbers may increase or diminish. Such variations give rise to questions of some difficulty, with which these

sub-sections are designed to deal. They are not at present entirely satisfactory and some more thought will have to be given to them before the Bill becomes law.

4. Amendments of the Furnished Houses (Rent Control) Act, 1946

Section 5 of the 1946 Act gave a limited measure of security of tenure by providing that if, after a contract to which the Act applied had been referred to a Tribunal by the lessee or by the local authority, a notice to quit was served on the lessee before the Tribunal's decision or within three months thereafter, the notice should not take effect before the expiration of the said three months. The Minister of Health has explained why the security of tenure given was so limited :—

> " When the Act of 1946 was a Bill and was before the House, I was warned by many of my hon. Friends that the security of tenure was not sufficient, that tenants who went to a tribunal would be victimised and that many tenants would be deterred from going to a tribunal for fear of victimisation. I was not unsympathetic to that contention, but I was exceedingly anxious that such security of tenure should not be given to tenants as would make landlords frightened to provide furnished accommodation and, therefore, would limit the amount of accommodation available, especially in London. Nevertheless, it has been obvious that a great deal of vindictiveness has taken place on the part of some landlords and some principal tenants and, therefore, that further protection is required " (*d*).

The present clause 11 of the Bill enables tenants to apply for, and Tribunals to grant, extensions of the period of security of tenure for successive periods, each not exceeding three months. The application to the Tribunal must be made after the notice to quit has been served and before the end of the period when the notice takes effect, whether by virtue of the contract, the 1946 Act, or the previous operation of the present clause. There is nothing in the clause to prevent an indefinite series of extensions of security of tenure being granted, which would give the tenant something like a status of irremovability. An Opposition amendment in Committee of the House of Commons, which would have placed an absolute limit on the security given of six months from the date of reference to the Tribunal, was defeated. It is to be remembered that the provisions of the 1946 Act will extend, once the Bill becomes law, to unfurnished accommodation which includes living accommodation shared between the landlord and the tenant.

It has already been mentioned that the Minister of Health is proposing to move an amendment at the Report stage which will have the effect of prohibiting the taking of premiums on the assignment, as well as on the grant, renewal or continuance, of rights under a contract to which the 1946 Act applies. This brings furnished lettings within that Act into line with the new provisions prohibiting the assignment of contractual tenancies within the principal Acts.

A minor amendment of the 1946 Act enables the Minister by order to divide areas constituted under that Act and direct that the parts shall be separate districts in which the Act has effect.

(*d*) Official Report, February 16, 1949, Vol. 461, c. 1232.

The Tribunals

A rather serious question arises as to whether the 1946 Act Tribunals will not, as a result of the combined operation of the 1946 Act and the present Bill, be given a load to carry which they are ill adapted to bear. They are now to be concerned with questions which involve the Rent Restrictions Acts as well as the Furnished Houses (Rent Control) Act. It remains to be seen whether the absence of a requirement that they must include a member with legal qualifications, and the absence of any provision for an appeal on points of law, will not now prove graver defects than hitherto. There are dangers of lack of uniformity of decision, of errors of construction which may go uncorrected, of findings upon unsatisfactory evidence, which are rather disquieting. Few who have studied this Bill carefully will be disposed to agree with the optimistic statement of Mrs. Jean Mann, M.P., during the Committee stage in the House of Commons,—" I do not find anything difficult in the Bill, which really will be very simple when we have finished with it." (Official Report, February 16, 1949, Vol. 461, c. 1210.)

THE LEASEHOLDER AND THE LAW OF RESTRICTIVE COVENANTS

By A. K. Kiralfy, LL.M., Barrister-at-Law

In practice most actions to enforce restrictive covenants in leases are brought under the common law doctrines of *Spencer's Case* (1583), 5 Co. Rep. 16a, and most actions to enforce restrictive covenants made on the occasion of a sale are brought under the equitable doctrine of *Tulk* v. *Moxhay* (1848), 2 Ph. 774. It would be a mistake, however, to make any fundamental dividing line on this ground. The inevitable result is to leave the many cases where the equitable doctrine is applied to leasehold property as anomalies, whereas in fact the rules of equity apply to leaseholds and freeholds equally. There is, indeed, an important difference between the law as applied to freeholds and the law as applied to leaseholds, but the difference is not that which is commonly assumed. The effect of failure to note this point is apparent in many statements of law. Thus, L. R. A. 1925, in dealing with restrictive covenants in one connection refers only to those " affecting freehold land " (L. R. A. s. 83 (11) (*c*)), although a proprietor registered with title to a leasehold may validly enter into a restrictive covenant affecting his land (L. R. A. s. 3 (xxiv), 8, 40). The L. P. A. 1925, s. 84 (12), on the other hand applies the machinery of modification and discharge to covenants affecting leasehold land where the covenant is contained in a long lease. *Cadogan* v. *Guinness*, [1936] Ch. 515, and *Iveagh* v. *Harris*, [1929] 2 Ch. 142, were both cases of ordinary lessor-lessee covenants, but the section is not so limited, and the application of equitable principles is the same as in the case of freeholds. Preston and Newsom in 1939 wrote a work on *Restrictive Covenants Affecting Freehold Land*, but the reader will find numerous

cases on leases referred to and discussed. On the other hand Sir Lancelot Elphinstone in his monograph on Covenants, 1946, makes the application of equitable principles to leases very clear and avoids the difficulty in which Preston and Newsom found themselves. Their suggested test of privity of estate fits most but by no means all the decisions on covenants in leases. Before summarising the present state of the law as to the position of the leaseholder under *Tulk* v. *Moxhay* it should be pointed out that a lessee or sublessee is liable under general principles if he violates a covenant made between two freeholders, if he took with notice or, today, if the covenant was duly registered. (See on this subject Dr. Logan's article in 1940 *Law Quarterly Review* 369.)

(1) A lessee may enter into a covenant with some person other than his lessor. In this case the equitable doctrine applies just as much as if the parties had been vendor and purchaser. An example is *Johns Bros.* v. *Holmes*, [1900] 1 Ch. 188, where a lessee covenanted with his mortgagee and the latter succeeded in obtaining an injunction against the subtenant of an assignee of the lease. *Elphinstone* (art. 68) applies this rule to any covenant made with another landowner, but there seems no clear decision on this, although it must be right in principle.

(2) Restrictive covenants may be entered into on the assignment of a lease just as on a sale of freeholds. Here, too, there is no room for common law principles.

In enforcing such covenants the Courts are not merely extending the scope of an existing valid covenant under *Spencer's Case* but enforcing a purely equitable right under *Tulk* v. *Moxhay*. Unfortunately both the decisions on this point concerned covenants against trade competition, but the principle is unaffected by this. In *Wilkes* v. *Spooner*, [1911] 2 K. B. 473, a tenant of Blackacre assigned his lease to the plaintiff and covenanted not to compete with him on other property, Whiteacre, occupied by the covenantor. Plaintiff failed on the question of notice but the covenant was clearly assumed to be good. In *Clements* v. *Welles* (1865), L. R. 1 Eq. 200, the plaintiff assignor was a covenantee with no interest in other land except that at the time of breach he occupied another shop. Romilly, M.R., assumed that plaintiff could sue but he was on stronger ground in his illustration (at p. 203) of the case of a building-lessee who, on assigning a lease of one house, took a covenant in favour of other houses on the estate.

(3) A tenant of property may enter into a covenant with another tenant under the same landlord. This appears from the judgment of Lewis, J., in *Newman* v. *Real Estate Debenture Corporation*, [1940] 1 All E. R. 131. Such a covenant may be implied. In *Spicer* v. *Martin* (1888), 14 App. Cas. 12, the action was between lessor and lessee. The other lessees were joined as defendants but did not contest the action. Lord Macnaghten, at p. 25, considered that the position of lessees under a "letting scheme" was just the same as that of purchasers under a "building scheme". In *Newman's Case* the other lessee had acquired the reversion on plaintiff's lease, so the point did not arise, but, although the case may be dismissed as based on implied contract, the Judge, at p. 141, refers to a "local law" benefiting all the tenants and relied on cases almost all of which were cases of building schemes under the rule in *Tulk* v. *Moxhay*. This is also the view of *Elphinstone* (articles 76 (6) and 78 (ix)).

(4) Then we come to the case where *Tulk* v. *Moxhay* is called in to enforce a covenant entered into directly between lessor and lessee. The effect is to enforce the covenant against underlessees and other occupiers having no privity of estate or contract with the covenantee. The statement of law of Cotton, L.J., in *Hall* v. *Ewin* (1887), 37 Ch. D. 74, at p. 79, is the basis of the law on this subject and has been cited in numerous decisions. " As I understand *Tulk* v. *Moxhay* the principle laid down there was that if a man bought an underlease, although he was not bound in law by the restrictive covenants of the original lease, yet if he purchased with notice of those covenants the Court of Chancery could not allow him to use the land in contravention of the covenants. That is a sound principle ". Recent developments in the law of restrictive covenants have in no way cast any doubt on this principle. Jessel, M.R., in *L. & S. W. Ry.* v. *Gomm* (1881), 20 Ch. D. at 583, made a statement which is the cornerstone of fundamental study of the doctrine of *Tulk* v. *Moxhay*, " it appears to me to be either an extension in equity of the doctrine of *Spencer's Case* to another line of cases or else an extension in equity of the doctrine of negative easements ". This is the key to the real difference between covenants in leases and covenants in transfers whether sales of freehold or assignments of leasehold. The doctrine in *Tulk* v. *Moxhay* demands one of two types of interest :—

(a) Two estates in the same land, one belonging to the plaintiff and one to the defendant, such that the breach of a covenant binding one estate will affect the value of the other.

(b) Two parcels of land, one belonging to the plaintiff and one to the defendant, where breach of covenant binding one affects the value of the other.

It is for this reason that a distinction was drawn in the later cases. In *Formby* v. *Barker*, [1903] 2 Ch. 539, Vaughan Williams, L.J., says, at 552–3, " Jessel, M.R., regards it as something arising from the relation of two estates one to the other ". In explaining why no action would lie he distinguished the two types of case above referred to (p. 549), " R. H. Formby had no contiguous estate which could be benefited by the covenant in question. Moreover, there is in the deed no re-entry clause under which the vendor could go in as of his old estate, or, indeed, as of any estate ". Plaintiff had " no estate " (*ib.*, p. 549), " no property belonging to him " (p. 554). In *L. C. C.* v. *Allen*, [1914] 3 K. B. at 653, Buckley, L.J., pointed out that plaintiff had no " adjoining land ", but as an alternative he also says plaintiff had " no land affected " by breach. He distinguished, at 659, the case of *Clegg* v. *Hands* (1890), 44 Ch. D. 503, " I do not feel any difficulty. The case was one between lessor and lessee ".

Scrutton, J., sitting in the Court of Appeal in the same case quotes Jessel's famous dictum and continues (p. 667), " Both, however, had this in common, that some land belonging to the covenantee was required, either for him to let, that the covenant might run with the land, or as a dominant tenement for the easement, an easement in gross being merely a personal right. Whether the ' analogy ' or ' extension ' spoken of by Sir George Jessel involved this condition as to land is not discussed ".

These dicta fully justify the conclusion made on general principles by Woodfall, *Landlord and Tenant*, 24th ed. (1939), 561, " But equity

has also extended the field of covenants which run with the land in the case of leaseholds, for the lessor's reversion is an interest in land to which the benefit of a restrictive covenant may be annexed in equity ".

An interesting confirmation is also found in a dictum of Romer, L.J., in *Clore* v. *Theatrical Properties, Ltd.*, [1936] 3 All E. R. 483, where he considered the possible application of *Tulk* v. *Moxhay* to help a licensee retain exclusive use of a refreshment bar. He concluded that the licensee had no interest in land and so could not claim the benefit of a restrictive covenant.

This type of restrictive covenant may therefore fairly be said to be an extension of *Spencer's Case* and the usual " contiguous " freehold covenant an extension of equitable easements.

The statement in *Woodfall* does not deal with the other possibility referred to by Vaughan Williams, L.J., in *Formby* v. *Barker* (*supra*), that a right of entry might support the benefit of a restrictive covenant. For the sake of completeness it should be pointed out that a right of re-entry may be reserved not only on a conveyance of a freehold but also on the assignment of a lease. An example is *Doe* d. *Freeman* v. *Bateman* (1818), 2 B. & Ald. 168, where A, a lessee, demised the whole term to B (which operated as an assignment), subject to a right of entry on breach of condition. A was held entitled to enter for condition broken. This rule is not affected by the decision in *Milmo* v. *Carreras*, [1946] 1 K. B. 306, where the head lessee purported to give notice to the sub-lessee, as a landlord giving notice to a tenant, and was held to have lost this right by subletting the entire residue of the term. Notice can only be given by a reversioner but no reversion is needed to support a right of entry.

(5) Finally, a lessor may, on leasing Blackacre, enter into a restrictive covenant binding other property not included in the lease. A case in point is *Jay* v. *Richardson* (1862), 30 Beav. 563, where a lessor leased Blackacre to the plaintiff and covenanted not to use any land within a quarter of a mile as a hotel. He leased another parcel, Whiteacre, to the predecessor of the defendant who took with notice of the restriction in the conditions of sale and was held bound. In *Holloway Bros.* v. *Hill*, [1902] 2 Ch. 612, X leased a shop to the plaintiff and covenanted as to the user of another shop which he then leased to the defendant, who was held liable to an injunction for breach of covenant.

VOLUNTARY ACQUISITION OF LAND BY LOCAL AUTHORITIES: PAYMENT OF VENDOR'S SOLICITORS' COSTS

By H. Woodhouse, M.A., Solicitor

Introduction

In the writer's previous article on this subject (published in the *Conveyancer* for September, 1948, at p. 9), reference was made to the question whether it was competent for a local authority, when acquiring land voluntarily in exercise of powers conferred by a statute which

incorporates (expressly or by implication) the provisions of section 82 of the Lands Clauses Consolidation Act, 1845, to agree to pay the vendor's solicitors' costs calculated on the scale basis under Schedule I of the Solicitors' Remuneration Act General Order, 1882.

It will be recollected that section 82 of the Lands Clauses Consolidation Act, 1845, provides that in the case of acquisitions of land under that Act the vendor's solicitors' costs of the conveyance are to be borne by " the promoters of the undertaking ". It will further be recollected that rule 11 of the rules applicable to Schedule I to the Solicitors' Remuneration Act General Order, 1882, provides that in the case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale in Schedule I shall not apply. Therefore, when a local authority agrees to purchase land in the exercise of powers conferred by a statute incorporating the above provision of the 1845 Act and the agreement is silent on the question of costs, the vendor's solicitors' costs calculated on a Schedule II basis are payable by the local authority, and the position is the same where the agreement specifies that the local authority shall pay " the vendor's solicitors' costs " (see *Re Burdekin*, [1895] 2 Ch. 136).

In a note on this subject published in the Law Society's *Gazette* in December, 1947 (p. 240) it was stated that in view of the provisions mentioned above doubts had arisen as to the validity of an express agreement by a local authority in such a case to pay the vendor's solicitors' costs calculated on a Schedule I basis, and that accordingly counsel's opinion on the point had been taken by the Council of the Law Society. Counsel had advised that such an agreement might be invalid and that " there might be a risk of a surcharge if a local authority enters into an agreement to pay scale costs to a vendor's solicitor, since it appears that a local authority is not legally entitled to make any payment for which there is no statutory power and it may not have any such power to pay scale costs if the amount of such costs exceeds what would have been payable on an item basis as limited by section 82 of the Lands Clauses Act ". That note in the Law Society's *Gazette* was referred to in the writer's previous article mentioned above.

Since the writing of that article the Law Society have obtained a further opinion of counsel, from which, according to the Law Society's *Gazette* for May, 1948 (p. 88), " it would seem that special agreements by local authorities as to costs are not *ultra vires* if reasonable, and that without risk of surcharge a local authority may, subject to the charge being reasonable, agree to pay scale costs. Alternatively, and subject to the same overriding factor, a local authority may agree to pay a gross sum. Furthermore, the costs of negotiation could legitimately be included in such an arrangement ". In this later opinion counsel expressly dissented from the previous opinion referred to above.

In view of the divergent opinions upon the question whether an agreement by a local authority to pay the vendor's solicitors' costs on a Schedule I basis is *intra vires*, it is important to examine more closely the legal points involved. In this way the underlying problems can be seen more clearly.

In this article it is proposed to consider the following points :—

A. The legal effect of section 82 of the Lands Clauses Consolidation Act, 1845.

B. The rights and obligations as between the vendor and his solicitors.

C. The rights and obligations as between the vendor and the "promoters of the undertaking".

D. The "vires" of a local authority.

At the end a short summary is added.

A. The Legal Effect of Section 82 of the Lands Clauses Consolidation Act, 1845

Section 82 of the 1845 Act provides that the costs of conveyances of land to be purchased under the provisions of that Act shall be borne by the promoters of the undertaking. Section 83 of the same Act provides that if the promoters of the undertaking and the party entitled to any such costs shall not agree as to the amount thereof, such costs shall be taxed. It was decided in *Re County of Middlesex Light Railways Order, 1903*, [1908] W. N. 167, that the proper parties to such a taxation are the vendor and the promoters and not the vendor's solicitors and the promoters. It therefore follows that section 82 does not give any direct right to the vendor's solicitors at all. It merely imposes an obligation upon the promoters for the benefit of the vendor. The position is clearly the same in a case where the contract for the sale of the land expressly provides that the promoters shall pay the vendor's solicitors' costs, for the contract is between the promoters and the vendor and not between the promoters and the vendor's solicitors. In other words the vendor is given an indemnity (in whole or in part as the case may be) against the costs payable by him to his solicitors. There are, therefore, two entirely distinct questions, namely :—

(1) What are the rights and obligations as between the vendor and his solicitors, and

(2) What are the rights and obligations as between the vendor and the promoters of the undertaking.

B. The Rights and Obligations as Between the Vendor and his Solicitors

(1) The vendor is, of course, liable to pay his solicitors' costs, even though he may have a right over against the promoters as mentioned above. Accordingly he would have the right to have these costs taxed (section 66 of the Solicitors Act, 1932).

(2) Taxation would be effected in accordance with the provisions of the Solicitors' Remuneration Act General Order, 1882, unless there is any special agreement as to remuneration between the client and his solicitors (section 56 (7) of the 1932 Act). That is the legal effect of the 1882 Order—it is an order regulating the taxation of solicitors' bills.

(3) It is possible for the vendor to make a special agreement as to costs with his solicitors and such an agreement can be enforced in the usual way, though if the vendor were to complain and could establish

the fact that the agreement was unfair or unreasonable it could be modified or set aside (section 57 of the 1932 Act as to non-contentious business).

(4) Where such a special agreement exists, taxation of costs according to the General Order would be possible in connection with the question of unfairness or unreasonableness (*Re Frape*, [1893] 2 Ch. at p. 296), but subject thereto the agreement would be enforceable by action and the amounts stipulated therein payable without taxation (*Re Inderwick* (1883), 25 Ch. D. 279, and *Re Palmer* (1890), 45 Ch. D. 291—cases on section 8 of the Solicitors' Remuneration Act, 1881, now replaced by section 57 of the 1932 Act).

(5) An agreement under section 57 of the Solicitors Act, 1932, must be in writing and may provide for the remuneration of the solicitors by (*inter alia*) a gross sum, commission or a percentage. Accordingly an agreement by a vendor with his solicitors that they should be remunerated on a Schedule I basis in a case where Schedule I is strictly inapplicable would seem perfectly possible under section 57.

C. The Rights and Obligations as Between the Vendor and the "Promoters of the Undertaking"

There are several points to be noted in this connection:—

(1) Where a third party is liable to pay the costs due from a client to his solicitors (*e.g.*, under an indemnity), the third party is entitled to have these costs taxed and the Court may, on the application of the third party, make the same order, if any, as they might have made at the instance of the client (section 67 (1) of the Solicitors Act, 1932—a general provision applicable to costs both in non-contentious and contentious matters).

(2) There is the special provision in section 83 of the Lands Clauses Act which makes it possible for the costs of the conveyance to be taxed as between vendor and promoters, if they shall not agree as to the amount thereof.

(3) *Prima facie* an agreement by a third party to pay "costs" (without more) means an agreement to pay taxed costs (*Vincent* v. *Venner* (1833), 1 My. & K. 212). Hence where a third party agreed to pay solicitors' costs (such costs to be agreed or taxed) it was held that the third party was only obliged to pay the solicitors' reasonable and proper costs and not special items which the solicitors could only recover from their client by reason of a special arrangement with the client (*Re Cohen and Cohen*, [1905] 2 Ch. 137). On the other hand, where the third party had agreed to pay a fixed sum in respect of costs, the bill was not taxable in the absence of special circumstances (*Re Morris* (1872), 27 L. T. 554, and see also *Re Palmer* (1890), 45 Ch. D. 291 (C. A.)).

(4) It is relevant to observe that where an agreement as to costs is made between a client and his solicitors *in a contentious matter*, section 60 (1) of the Solicitors Act, 1932, expressly provides that such an agreement shall not affect the amount of any costs payable *to* the client by any person other than the solicitors and that person may, unless he has otherwise agreed, require such costs to be taxed according to the rules for the time being in force for the taxation thereof. There is no parallel provision as to costs in *non-contentious matters* in the

1932 Act, but in view of the cases cited in (3) above a similar rule must in effect apply, for it would clearly be inequitable that the solicitors and their client could by special agreement increase the third party's liability without his consent. This view is taken in *Cordery on Solicitors* (4th ed.), p. 340, in connection with the ordinary cases where a third party is liable to pay solicitors' costs (the mortgagor for the mortgagee's solicitors' costs, the lessee for the lessor's solicitors' costs).

(5) There is nothing in the Solicitors Act, 1932, to prevent the third party from concurring in the special agreement between the client and his solicitors and from thus assuming ultimate responsibility for the costs as determined by that agreement. In such a case the third party (having thus become a person " liable to pay a solicitor for his services any costs ") could take advantage of the proviso to section 57 (4) of the 1932 Act, and in a suitable case object to the agreement as being unfair or unreasonable, for he falls within the extended definition of " client " given in section 56 (8) of the Solicitors Act, 1932, and applicable to sections 56 and 57 of that Act.

(6) It is relevant to note that in connection with costs taxable under section 83 of the Lands Clauses Act, 1845, as between the vendor and the promoters, taxation is to take place " if the promoters of the undertaking and the party entitled to any such costs shall not agree as to the amount thereof ", *i.e.*, section 83 does envisage the possibility of an agreement between the vendor and the promoters. Indeed, it has been decided that provisions in the Lands Clauses Acts as to taxation of costs can be modified or excluded by agreement (*Doulton* v. *Metropolitan Board of Works*, L. R. 5 Q. B. 333, and *Wombwell* v. *Barnsley Corporation* (1877), 36 L. T. (N.S.) 708). Accordingly, then, subject to the question of vires, there appears to be nothing to prevent the promoters from concurring in a special agreement as to costs made between a client and his solicitors, though in the absence of such concurrence the promoters would not be liable for any amounts payable under such an agreement in excess of the taxed costs.

(7) It follows from the fact that the promoters' obligation (whether directly under section 82 of the Lands Clauses Act or under an express agreement to pay costs) is in effect an obligation to reimburse the vendor (wholly or in part) in respect of the amounts payable by him to his solicitors, that the promoters should not pay to the vendor a greater amount than he is liable to pay to his solicitors. If it is correct that the promoters can lawfully concur in an agreement between a vendor and his solicitors as to costs, the promoters are clearly entitled to be satisfied as to the existence and enforceability of the agreement between the vendor and his solicitors. For such an agreement to be enforceable it must be in writing and signed by the person to be bound thereby or his agent in that behalf (section 57 (3) of the Solicitors Act, 1932), though apparently it need not be signed by both parties (*Re Thompson*, [1894] 1 Q. B. 462). Nor is there anything in section 57 as to the exact form of such an agreement—thus a receipt signed by the client may suffice (*Re Thompson, ubi supra*). It seems to be arguable that in a case where the draft contract (for the sale of the land) is prepared by the vendor's solicitors (as it normally is) and contains an express provision that the promoters shall pay the vendor's solicitors' costs calculated on a Schedule I basis (when

Schedule II would normally be applicable), and where the engrossment is then signed by the client and returned to his solicitors, upon receipt of the signed engrossment by the solicitor there is then in existence an agreement in writing as to the costs between the vendor and his solicitors, for by signing the engrossment containing such a provision the vendor is in effect agreeing that the solicitors shall be so remunerated. It is not certain, however, that this conclusion is justified, for the contract signed by the vendor is not intended to be a contract between the vendor and his solicitors but between the vendor and the promoters and hence, so far as regards the solicitors, it might be regarded as a " res inter alios acta " (in the same way that a third party is a stranger to obligations in the Articles of Association of a company—*Eley* v. *Positive, etc., Assurance Co.*, L. R. 1 Ex. D. 20). In spite of this objection, it seems probable that in practice reliance ought to be placed on an express provision in the contract for the parties to the contract of sale, and the solicitors dealing with the matter could hardly go behind an express provision of this nature. No doubt in the normal case a sufficient agreement in writing might be spelled out of the correspondence between the vendor and his solicitors leading up to the signing of the contract of sale, though the solicitors would in all probability object to showing such correspondence to third parties. On the other hand, in a case where the contract of sale, though containing an express provision as mentioned above, is not signed by the vendor himself but only by the solicitors as his agents, it seems impossible to argue that the document so signed can be an agreement in writing between the vendor and his solicitors for the purpose of section 57 of the 1932 Act, for on the analogy of the rule in *Sharman* v. *Brandt* (1871), L. R. 6 Q. B. 720, that one party to a contract cannot sign the note or memorandum as agent of the other party for the purpose of the Statute of Frauds, it is submitted that the solicitor could not sign an agreement as to costs for the purpose of section 57 (3) as agent for the vendor. The agreement must either be signed by the vendor or some agent of his other than the solicitors.

D. The " Vires " of a Local Authority

(1) A local authority has power to acquire land voluntarily for the purpose of any of its functions under the Local Government Act, 1933, or any other public general Act (section 157 of the L. G. A., 1933) and in connection with such acquisitions the acquiring authority will be regarded as the " promoters of the undertaking " for the purpose of the Lands Clauses Consolidation Act, 1845 (section 176 of the L. G. A. 1933).

(2) A statutory corporation has power to perform the things authorised by the relevant statutes and all incidental or consequential matters. " Whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires* " (*per* Lord Selborne in *Att.-Gen.* v. *G. E. R.* (1880), 5 App. Cas. at p. 478). This doctrine is applicable to local authorities which are the creatures of statute (*L. C. C.* v. *Att.-Gen.*, [1902] A. C. 165). Thus when a local authority purchased land by agreement for any of the purposes for which it was authorised to acquire land by the

Public Health Act, 1875, it was held not to be *ultra vires* for the local authority to enter into reasonable restrictive covenants with the vendor provided that such covenants did not prevent the user of the land for the particular purpose for which it was acquired (*Stourcliffe Estates Co., Ltd.* v. *Bournemouth Corpn.*, [1910] 2 Ch. 12).

(3) There is nothing in the Lands Clauses Act prohibiting agreements as to costs between the vendor and the acquiring authority. In fact section 83 only provides for taxation (with the consequent reference to the Solicitors' Remuneration Act General Order) in a case where the promoters and the vendor do not agree as to the amount of the costs—thereby envisaging, it would seem, the possibility of agreement between the parties. Indeed, in the case of *Re Burdekin*, [1895] 2 Ch. 136, itself the local authority had in the contract before the Court agreed to pay the vendor's costs in connection with the negotiation, preparation and execution of the contract as well as the costs of the conveyance, the relevant clause in the contract thus imposing a much wider liability on the local authority than would have been imposed by section 82 of the Lands Clauses Act alone, as that section merely relates to the costs of the conveyance and does not include any negotiating fee. There is no suggestion in *Re Burdekin* that such an agreement was *ultra vires*. Indeed, when the case was before the Court of first instance it was said by Kekewich, J., that: "It was perfectly competent for the local board . . . to make special agreements for payment of costs not strictly according to the terms of the 82nd section, whether they purchase by agreement or otherwise", see [1895] 2 Ch. at p. 141. Similarly in the case of *Wombwell* v. *Barnsley Corporation* (1877), 36 L. T. (N.S.) 708, which related to the question of costs of an arbitration, it was stated by Lush, J. (at p. 710) that: "It is competent to the parties to an arbitration under the Lands Clauses Acts to contract themselves out of the Act of 1869". Although the matter of vires was not raised in either case, it appears to have been assumed without question that the agreements were not *ultra vires*. It may also be noted that in the case of *Re Evans*, [1905] 1 Ch. 290, it was held that a solicitor acting for a local authority on the purchase of land (*i.e.*, the purchaser's not the vendor's solicitor) could (in exercise of the power conferred by para. 6 of the General Order, 1882), elect to charge under Schedule II instead of under Schedule I, and in that case also no question of the possibility of lack of vires on the part of the authority was raised, the view being taken that it was competent to the parties to enter into such an arrangement.

(4) In view of the foregoing cases it is difficult to see how an agreement by a local authority to pay Schedule I costs could be *ultra vires* provided that in all the circumstances it was reasonable and that the vendor had expressly agreed with his solicitors that they should be remunerated on that footing. What is reasonable is, of course, a question of fact, but if the case were one of difficulty, or one where the vendor was likely to refuse to sell voluntarily unless Schedule I costs were paid, or one where successful opposition might be made to a compulsory purchase order if the matter were left for compulsory purchase and not settled by agreement, or one where otherwise it would be prudent and business-like to agree that Schedule I costs should be paid, it is hard to see how any question of lack of vires could arise. On the other hand the

acquiring authority should have satisfied itself that the vendor had expressly agreed with his solicitor for remuneration on a Schedule I basis, for the authority would not, it is submitted, be justified in paying to the vendor in respect of costs any amounts for which he was not liable to his solicitors. In practice, of course, that difficulty should not arise where the vendor or some agent of his (other than the solicitors) has signed the contract and the contract contains a clause providing expressly for Schedule I costs. It is also relevant to note that the local authority could take advantage of the proviso to section 57 (4) of the Solicitors Act, 1932, and raise the objection of unfairness or unreasonableness in a suitable case.

Summary

The position as to express agreements to pay Schedule I costs may be summed up as follows :—

(a) The obligation of the acquiring authority, whether under section 82 of the Lands Clauses Act or under an agreement by that authority to pay costs, is an obligation to the vendor and not to his solicitors. The fact that in practice the amount of the costs is paid by the acquiring authority to the solicitors on completion should not obscure the fundamental legal relationship.

(b) The right of the vendor's solicitors to costs is a right against their client and such costs will, in the absence of any special agreement between the client and his solicitors, be taxable according to Schedule II, in view of rule 11 of the Rules to Schedule I to the Solicitors' Remuneration Act General Order, 1882.

(c) The vendor and his solicitors may make such a special agreement as to costs, but it must be in writing and be signed by the vendor or his agent (section 57 of the Solicitors Act, 1932). It would seem that the solicitors cannot sign as the vendor's agent for this purpose.

(d) Such a special agreement between the vendor and his solicitors could not by itself operate to increase the acquiring authority's obligation as to payment of costs under section 82 of the 1845 Act or otherwise. The acquiring authority may, however, concur in such an agreement and undertake to pay costs on the basis agreed between the solicitors and their client. This is what will normally happen, for it must be a very rare occurrence in a case of this nature for the vendor and his solicitors to agree the amount of the costs on some special footing and not to seek to pass on the increased obligation to the purchasing authority. Indeed, when the solicitors had already received a sum on account of costs from the purchasing authority, they would probably experience some difficulty in recovering the balance from their client, unless they had previously explained the position fully and obtained his concurrence.

(e) It is not *ultra vires* for the acquiring authority expressly to undertake such increased liability, provided that it is reasonable in all the circumstances to do so.

(f) The acquiring authority is entitled to satisfy itself that the

vendor has agreed in writing that his solicitors should be remunerated according to the scale. The vendor's signature to a contract of sale, which contains an express provision for payment of scale costs by the acquiring authority, should be sufficient for this purpose, but the solicitors' signature as agents for the vendor would not.

It might be observed in conclusion that in view of the effect which the provisions of the Town and Country Planning Act, 1947, have had on the prices which local authorities are willing to pay for land, solicitors acting for vendors will in many cases (particularly where the area of the land to be sold is small) find it better to have their costs calculated according to Schedule II on the actual work done than under Schedule I by reference to a percentage of the purchase price.

INFANT SETTLEMENTS—SOME FURTHER ASPECTS

By DESMOND MILLER, Barrister-at-Law

In a previous article on this subject-matter (*The Conveyancer*, Vol. 12, No. 3, dated March, 1948), the writer dealt with two material aspects of settlement, *viz.*, "Accumulations" and "Reservations". Assuming now, therefore, that these obstacles have been successfully surmounted it is proposed to refer to the settled property—in connection with certain types of company—which will conclude the subject from the aspect of a charge to tax on the settlor upon income arising from the settled funds. Next, the incidence of estate duty on the death of beneficiary or settlor and, lastly, should space permit, the valuation for estate duty purposes where the provisions of the Finance Act, 1940, are in point.

THE SETTLED PROPERTY

Assume, as is frequently the case, that the settlor desires to settle on his children shares in a private (possibly family) company, of which, by virtue of his shareholding, he is in control, and the prime difficulty created by section 38 of the Finance Act, 1938, becomes apparent; by sub-section (2) *ibid.*, the statute provides:

"If and so long as the terms of any settlement are such that—

(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and

(b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised;

any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a

corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person :

Provided that, where any such power as aforesaid cannot be exercised within six years from the time when any particular property first becomes comprised in the settlement, this sub-section shall not apply to income arising under the settlement from that property, or from property representing that property, so long as the power cannot be exercised."

The facts and decision in *C. I. R.* v. *Morton*, 24 T. C. 259, are illustrative of the principles involved; in that case a private company was formed to which assets were transferred by the settlor and his wife in consideration of the issue of shares to them, and under contemporaneous deeds of trust to their children; the parent/settlors being at all times in complete control of the company. The Court found :

(a) that the whole transaction, including the formation of the company was a " settlement ";

(b) that the property comprised in the settlement was the capital assets of the company;

(c) that by virtue of share control the parent/settlors had power to impose a winding up;

(d) that in such a winding up the settlors (possessing preferential rights) *might* become entitled to the whole of the settled funds.

It was accordingly held that the criteria enumerated in section 38 (2) of the Finance Act, 1938, were satisfied, and that the whole income of the settlement (including that portion distributed to the children under the Deeds of Trust (*supra*)) fell to be regarded as income of the settlors.

Admittedly the facts in this case were of a very special nature, and a forceful dissenting judgment was delivered by Lord Moncreiff, which certainly merits careful scrutiny; at the same time the decision has not been expressly overruled, and must therefore be borne in mind when advising as to proposed settlements.

In *Chamberlain* v. *C. I. R.*, 25 T. C. 317, the facts were somewhat analogous to those last enumerated, but with at least one most material distinction. Here the settlor settled *money* to be invested as he should direct (although it was intended to be and was invested in the purchase of shares in the company which he controlled); it was held that the sums settled were the funds furnished for the purpose of the settlement and that the company, although controlled by the settlor, did not hold its assets as part of the provision settled on his children. In his judgment Lord Thankerton, at p. 329, said this : " The question may be thus stated. Did the property comprised in the settlement consist of the whole assets of Staffa or is the property comprised in the settlement to be found separately comprised in each of the five deeds of settlement, the formation of Staffa being part of the arrangement conceived by the appellant, whereby a convenient and profitable investment was made available for the moneys respectively settled under the five deeds of settlement? . . . I am of opinion that the latter alternative provides the correct view of the arrangement ".

Reference may also usefully be made to the decision in *Wolfson* v. *C. I. R.*, [1948] 1 All E. R. 725 (C. A., now under appeal to the House

of Lords), a case under section 38 (1) of the Finance Act, 1938. Here the settlor had covenanted to make annual payments, the quantum being determined by the amount received by him, by way of dividend, from a company which he effectively controlled. It was not contended that the settlement consisted in anything other than the Deed of Covenant, but the Crown nevertheless maintained that the settlor could determine his liability by either preventing payment of any dividend or by putting the company into liquidation: but held (by majority decision) that the power to determine under section 38 (1) (*supra*) must be found in the terms of settlement and not *aliunde*, and that the annual payments were accordingly admissible deductions for surtax purposes.

The conclusion appears to be this that in any consideration of a prospective settlement of the nature above indicated, first, careful attention must be given to the definition of "settlement" as contained in section 41 (4) (b) of the Finance Act, 1938, remembering that "arrangement" in this context is not a term of art but is used in a business sense (cp. *C. I. R.* v. *Payne*, 23 T. C. 610, at p. 626), and secondly, that where there is any doubt it will probably be preferable that money rather than the shares should be the subject-matter of settlement.

It would not be out of place in the context also to direct attention to section 40 of the Finance Act, 1938; the hypothetical company the disposition of whose shares we are considering will, in all probability be "a body corporate connected with the settlement" as these terms are defined by section 41 (4) (e) of the Finance Act, 1938, and in consequence any payment by the company to the settlor may well fall within the mischief of section 40 (3), *ibid.*, *viz.*, "for the purpose of this section any capital sum paid to the settlor in any year of assessment by any body corporate connected with the settlement in that year shall be treated as having been paid by the trustees of the settlement in that year".

Broadly the effect is that unless the sum so paid is paid as income or for full consideration, it will be treated as income of the settlor to an extent determined by the income arising under the *settlement* and not distributed; cp. *Potts' Executors* v. *C. I. R.*, Tax Leaflet No. 1462.

ESTATE DUTY

The assumptions are that the parent/settlor has adopted a form of settlement which:

(a) makes vesting of interest contingent upon the attainment of the age of twenty-two years by the beneficiary;

(b) directs accumulations during the life of the settlor or until the beneficiary attains twenty-two, "whichever period be the shorter";

(c) makes provision against the event of the settlor's death subsequent to the beneficiary's attainment of majority but before he reaches twenty-two years of age, by a direction that thereupon the income of the settled fund, as then accumulated, shall be paid to the beneficiary during life or until he attains twenty-two, "whichever period be the shorter".

1. On death of Beneficiary: The provisions of section 5 (3) of the Finance Act, 1894, as amended by section 48 of the Finance Act, 1938,

will normally secure exemption from duty on the beneficiary's death before attaining an interest in possession; and it will be noted that the possibility of receiving maintenance at the discretion of the trustees, either under the terms of the settlement or under the statutory powers, *vide* section 31 of the Trustee Act, 1925, is not, of itself, an interest in possession for this purpose, cp. *Att.-Gen.* v. *Power*, [1906] 2 Ir. R. 272. Further, a claim to exemption may lie under the provision of section 15 of the Finance Act, 1896.

2. On death of Settlor: Should the settlor die within five years from the date of execution of the settlement the normal rule as to gifts *inter vivos* secures that the settled property shall be deemed to pass at his death. Subject to this overriding consideration two sets of circumstances ensue:

(a) on the settlor's death before attainment by the beneficiary of his majority;

(b) on the settlor's death subsequent to the beneficiary's attainment of majority but prior to the vesting of interest under the terms of settlement (*supra*).

In case (a), there is power both in equity and by law, the latter under section 31 of the Trustee Act, 1925, to continue accumulation for the infant contingently entitled, and there is consequently no change in the beneficial interest at or by reason of the death. In these circumstances, therefore, no charge to estate duty will arise by reason only of such a death.

In case (b) the position substantially differs: there is in the event predicated no power to continue accumulation (*vide* section 164 of the Law of Property Act, 1925), and the income prior to vesting of the interest in corpus is immediately payable to the infant beneficiary. The existence of a charge to estate duty is therefore certain, the extent arguable: in the writer's submission the true view is that this is an interest arising which is chargeable under section 2 (1) (d) of the Finance Act, 1894, and that the value of such interest is aggregable with the deceased settlor's estate for the purpose of determining the rate of duty payable. Cp. *Re Hodson's Settlement*, *Brooks* v. *Att.-Gen.*, [1939] 1 Ch. 343; *Westminster Bank, Ltd.* v. *Att.-Gen.*, *ibid*, at p. 610; had provision not been made for the disposal of income during the period in question (see assumption (c), *supra*) there would be a passing under section 1 of the whole settled fund, cp. *Re Bourne's Settlement Trusts*, *Bourne* v. *Mackay*, 115 L. J. Ch. 152.

Valuation Under the Finance Act, 1940

Against the background under consideration it is unlikely that the settled shares will fall to be valued at the beneficiary's death under the material statutory provision and, in consequence, be it assumed that the settlor has died within five years of execution of the settlement.

The intendment and effect of the enactments (sections 46 to 59, and Seventh Schedule, the Finance Act, 1940, as amended by sections 35 to 39, the Finance Act, 1944), is that, where applicable, shares and debentures will be valued by reference to the value of the company's assets, not upon the open market basis prescribed by section 7 (5) of the Finance Act, 1894. Disregarding for the moment the "benefit" (section 46) and "notional benefit" (section 47) provisions, as not

strictly material, the issue therefore lies between valuation under section 55 (which is imperative) and upon the "open market" basis. Section 55 applies to :

(a) any body corporate wheresoever incorporated (section 59);
(b) which was at any relevant time (or would on certain expressed assumptions) have been deemed for the purpose of section 21 (6) of the Finance Act, 1922, to be under the control of not more than five persons (section 58 (1) (a), (b)).

Section 21 (6) of the Finance Act, 1922, must be read in this context as amended by sections 31 and 32 of the Finance Act, 1927; sections 19 and 20 of the Finance Act, 1936; section 14 of the Finance Act, 1937; and sections 13 to 15 of the Finance Act, 1939. It is impossible usefully to attempt a summary of these latter provisions, but it may be noted, first, that for estate duty purposes it is immaterial whether the company is or was a "subsidiary company" or one in which "the public are substantially interested", and secondly, that the number of persons in control is to be calculated by treating relatives of one another, nominees of any person together with that person, partners, persons interested in any shares or obligations of the company subject to a trust or which are part of the estate of a deceased person, respectively, as a single person.

Having determined that the company is in fact "controlled" for this purpose it is next material to consider whether the deceased possessed such powers over or rights in the company as will necessitate valuation otherwise than under section 7 (5) of the Finance Act, 1894. Section 55 (1) prescribes the three differing tests, all relative to the period of five years ending with the death. First, control of the company by the deceased : the circumstances in which such control is deemed to exist are defined by section 55 (3), *e.g.*, control in virtue of voting rights; and, it will be remembered, that such degree of control which *could* have been obtained by the deceased by the exercise of a power "exercisable by him or with his consent", will suffice. Control had in a fiduciary capacity is, however, to be disregarded for this purpose, unless apparently such capacity was imposed by a disposition made by the deceased, *e.g.*, as trustee of a settlement executed by him, cp. section 58 (5), the Finance Act, 1940.

The remaining provisions of section 55 (*supra*) will require examination in some detail, and accordingly this must, for the time being, be postponed. Relative to the above, however, reference should be made to the exemption from a section 55 valuation to shares dealt in on a recognised Stock Exchange (*per* section 55 (4)), and to the decisions following, which may be of assistance in considering whether "control" as defined by section 55 (3), subsists, *viz.*, *Himley Estate, Ltd. and Anor.* v. *C. I. R.*, [1933] 1 K. B. 472; *British American Tobacco Co., Ltd.* v. *C. I. R.*, [1943] A. C. 335.

THE TRANSITIONAL PROVISIONS OF THE 1925 PROPERTY ACTS

TENANCIES IN COMMON, JOINT TENANCIES AND TENANCIES BY ENTIRETIES

By H. Woodhouse, M.A., Solicitor

In spite of the fact that over twenty years have elapsed since the coming into force of the 1925 Property Acts, it will be many years yet before conveyancers can safely leave to the legal historian the transitional provisions of the 1925 Property Acts. Although cases upon the transitional provisions are less frequent than in the years immediately after 1925, the recent case of *Re Harvey*, [1947] Ch. 285, serves as a reminder that a knowledge of these provisions is still necessary for the practitioner. In addition a vendor under an open contract of sale is required to commence title with an instrument at least thirty years old (section 44 (1) of the L. P. A. 1925). Hence it is still important for the conveyancer to be able readily to advise on titles which depend on the operation of the transitional provisions of the 1925 Acts.

No part of the transitional provisions of the 1925 Acts has occasioned so much difficulty or given rise to so many decisions and articles as Part IV of the First Schedule to the L. P. A. which relates to undivided shares in land. The notes in Wolstenholme and Cherry's *Conveyancing Statutes* (12th ed.), and the articles by Mr. A. H. Withers in 76 S. J. 239 and subsequent issues (published in pamphlet form by the Solicitors' Law Stationery Society but now out of print) appear to contain the fullest existing discussions on the cases and problems arising on the transitional provisions relating to undivided shares. In addition Mr. Cozens-Hardy Horne's book upon the Transitional Provisions of the Property Acts, 1922 and 1925, contains many useful suggestions. These works were published in 1932 and 1935 respectively and consequently do not contain the most recent cases. For a recent discussion of the transitional provisions of the 1925 Acts see *Williams on Title*, p. 329 *et seq.* And see also 203 L. T. Journal, p. 7.

The present study represents an attempt to collect together notes of all the reported cases and the substance of the articles published in the various legal periodicals from 1925 to date, in so far as they deal with the transitional provisions of the 1925 Acts relating to undivided shares and other concurrent interests in land.

The transitional provisions relating to undivided shares are contained in Part IV of the First Schedule to the L. P. A. There are no transitional provisions expressly so called in relation to joint tenancies, but it is important to realise that section 36 of the L. P. A. (which creates a trust for sale in the case of beneficial joint tenancies) has, in a sense, a transitional aspect and hence can be usefully studied in this connection. Tenancies by entireties are dealt with briefly in Part VI of the First Schedule to the L. P. A. In this study it is proposed to

discuss undivided shares first of all, then joint tenancies and finally tenancies by entireties.

Undivided shares are discussed under the following heads :—

A. Definition of the phrase " undivided shares ".
B. The substantive provisions of the 1925 Acts relating to undivided shares.
C. The general effect and object of Part IV of the First Schedule to the L. P. A.
D. Undivided shares vested in possession immediately before January 1, 1926—paragraph 1 of Part IV of the First Schedule to the L. P. A.
E. Undivided shares falling into possession on or after January 1, 1926, though created before that date—paragraph 2 of Part IV of the First Schedule to the L. P. A.
F. Party structures and open spaces—paragraph 3 of Part IV of the First Schedule to the L. P. A.
G. Settled land—the special case—paragraph 4 of Part IV of the First Schedule to the L. P. A.
H. The nature and effect of the statutory trusts.
I. Appointment of new trustees of the statutory trusts.
K. Partnership land.

Joint tenancies and *tenancies by entireties*, are discussed more briefly afterwards.

In each instance the actual text of the statute has been set out in bold type, so that the reader may have a copy of the text readily available for reference.

UNDIVIDED SHARES

A. Definition of the phrase " undivided shares "

There is no definition of " undivided shares " in the L. P. A. and there is room for argument as to the types of concurrent ownership covered. In view of the fact that the L. P. A. deals separately and, to some extent, in a different way with undivided shares and joint tenancies (see sections 34–36), it seems clear that for the purposes of the Act the interest of a joint tenant is not to be treated as an undivided share. This view is uniformly accepted by conveyancers and may be regarded as settled. As tenancies by entireties are converted by Part VI of the First Schedule to the L. P. A. into joint tenancies, it is similarly clear that the interest of a former tenant by entireties is not an undivided share. On the other hand the interest of a tenant in common is an undivided share for the purposes of the Act (see, *e.g.*, *per* Clauson, J., in *Re House*, [1929] 2 Ch. at p. 171). The position of the interest of the co-parcener is, however, not so clear. Although co-parcenary approximates more closely in some respects to joint tenancy than to tenancy in common, yet in view of the fact that there is no survivorship between co-parceners, it is thought that the interest of a co-parcener must be regarded as an undivided share so as to bring into operation the provisions of Part IV of the First Schedule to the L. P. A. and terminate the splitting of the legal estate among a large number of persons,—a mischief which was aimed at by the 1925 property legislation. This view is supported by the use of the words " tenants in common or co-parceners " in sub-para. (10) of para. 1 of

Part IV, a use which suggests that Part IV is intended to cover both tenancy in common and co-parcenary. As to the whole question reference may be made to *The Conveyancer* (N.S.) Vol. 9, pp. 181 *et seq.*

B. The substantive provisions of the 1925 Acts relating to undivided shares

Section 1 (6) of the L. P. A. provides briefly that a legal estate is not capable of subsisting or of being created in an undivided share in land.

Section 34 (1) of the L. P. A. provides that an undivided share in land shall not be capable of being created except as provided by the S. L. A. 1925, or as thereinafter mentioned.

Section 34 (2)–(4) deals with the manner in which a limitation of land in undivided shares after 1925 is to take effect and provides broadly that in all cases an undivided share in possession may only take effect behind a trust for sale.

Section 35 of the L. P. A. sets out the statutory trusts.

Section 36 of the L. P. A. (which deals primarily with joint tenancies) provides incidentally that after 1925 no severance of a joint tenancy of a legal estate so as to create a tenancy in common in land shall be permissible.

Section 205 (1) (ix) of the L. P. A. which defines " land " excludes therefrom an undivided share in land.

Section 36 of the S. L. A. describes what is to happen when after 1925 settled land is held in trust for persons entitled in possession in undivided shares.

Section 117 (1) (ix) of the S. L. A. excludes an undivided share in land from the definition of " land " for the purposes of that Act.

C. General effect and object of Part IV of the First Schedule to the L. P. A.

It will be recollected that Part I of the First Schedule to the L. P. A. converts into equitable interests estates which were subsisting at law prior to the commencement of the Act, but which as a result of the Act were no longer capable of taking effect as legal estates.

Part IV of the First Schedule has as its object the bringing of pre-1926 titles into conformity with the substantive provisions of the 1925 legislation outlined above. This object is clearly stated in the heading of Part IV (" Provisions subjecting land held in undivided shares to a trust for sale ").

Part IV as originally enacted contained three paragraphs, but a fourth paragraph was added by the L. P. (Amendment) Act, 1926.

Paragraph 1 is the vital paragraph. Its effect is to vest the legal estate in the appropriate person or persons and to impose the statutory trust for sale in the several cases where, immediately before the commencement of the Act, land was held at law or in equity in undivided shares vested in possession.

Paragraph 2 operates similarly in cases where undivided shares in land, created before the commencement of the Act, fall into possession after such commencement, and the land is not settled land.

Paragraph 3 excludes from the operation of Part IV party

structures and open spaces. These are dealt with in Part V of the First Schedule to the L. P. A.

Paragraph 4, added by the L. P. (Amendment) Act, 1926, deals with a special case where the interests of tenants for life in undivided shares in settled land are converted into a joint tenancy and in consequence no trust for sale arises. It constitutes an exception to the operation of para. 1.

For a general study of the problems arising under Part IV, reference should be made to articles by Mr. A. H. Withers in 76 S. J., pp. 239, 260 and 380, and by Mr. J. M. Lightwood in 73 L. J. Newsp. pp. 41, 57, 75, 93 and 111.

D. Undivided shares vested in possession immediately before January 1, 1926

PARAGRAPH 1 OF PART IV OF THE FIRST SCHEDULE TO THE L. P. A.

Paragraph 1 commences with an introductory clause which governs the entire paragraph. This clause indicates the scope of the paragraph. Then follow twelve sub-paragraphs. Sub-paras. (1)–(4) contain the vesting provisions and constitute the main substance of the paragraph. Sub-paras. (5)–(12) contain certain consequential and ancillary provisions.

It is proposed to treat paragraph 1 under the following sub-heads :—

§ 1. The scope of the paragraph—the introductory clause.
§ 2. Outline of the vesting provisions contained in sub-paras. (1)—(4).
§ 3. Vesting of land held by trustees or personal representatives—sub-para. (1).
§ 4. Vesting of land held by beneficial owners—sub-para. (2).
§ 5. Vesting of settled land—sub-para. (3).
§ 6. Vesting in other cases—the residuary sub-para.—sub-para. (4).
§ 7. Consequential provisions—sub-paras. (5) and (6).
§ 8. Incumbrances—sub-paras. (7), (8), (9) and (12).
§ 9. Pending contracts and partition actions—sub-paras. (10) and (11).

§ 1. *The scope of paragraph 1 of Part IV of the First Schedule to the L. P. A.*

THE INTRODUCTORY CLAUSE

Para. 1 commences as follows :—

" Where immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect " :—

These words govern the whole of para. 1. Before the vesting provisions of para. 1 can operate in any case, the circumstances have to

fulfil the requirements of these words. In connection with these words the following points are noted :—

(i) " *Immediately before the commencement of this Act* ".

The para. looks to the state of affairs in existence immediately before January 1, 1926. Thus the question whether the land was " settled land " for the purposes of sub-para. (3) of para. 1 has to be answered by asking whether it was " settled land " immediately before January 1, 1926, *i.e.*, whether it was " settled land " under the S. L. Acts, 1882–90 (*Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62); and the question whether there were " trustees of the settlement " for the purposes of the same sub-para. has to be similarly answered (*Re Catchpool*, [1928] Ch. 429). The words " immediately before the commencement of the Act " have also been interpreted as signifying that para. 1 of Part IV of the First Schedule is to operate before para. 3 of Part II can take effect, with the consequence that para. 1 of Part IV may vest the land in trustees for sale from whom it cannot be divested under para. 3 of Part II (which provides that where, *after the commencement of the L. P. A.*, any person is entitled to require any legal estate (*not vested in trustees for sale*) to be conveyed to or otherwise vested in him, such legal estate shall vest as therein provided). This point was established by the case of *Re Forster*, [1929] 1 Ch. 146. In this case the position was that before the commencement of the L. P. A. land was held by the personal representatives of a settlor in trust for persons entitled under the settlement in undivided shares, the settlement itself not having contained a conveyance of the land by the settlor to the trustees but merely a declaration of the settlement trusts. Prior to 1926 the settlement trustees would have been entitled to require the settlor's personal representatives to vest the legal estate in them, but it was held that no vesting under para. 3 of Part II of the First Schedule L. P. A. took place, because by the operation of sub-para. (1) of para. 1 of Part IV (which took effect as it were, " immediately before the commencement of the Act ") the personal representatives had become trustees for sale at the commencement of the Act and consequently the words of the exception " not vested in trustees for sale " in para. 3 of Part II applied. Hence the legal estate remained vested in the personal representatives who held it upon the statutory trusts for the persons entitled in undivided shares in possession.

(ii) " *Land is held at law or in equity in undivided shares* ".

Para. 1 applies whether the land is held in undivided shares at law or in equity. The normal case is where the land is held in undivided shares in equity alone or both at law and in equity together. But a case may occur (though it may be unusual) where the land is held in undivided shares at law alone, *e.g.*, by A and B as tenants in common upon trust for C absolutely. Where a trust for sale was in existence before the L. P. A. came into force, so that before Part IV could operate the interests of the beneficiaries were merely interests in the proceeds of sale of land, then para. 1 did not apply, since " land " was not held in undivided shares but only the proceeds of sale (*i.e.* personalty).

Para. 1 is not limited to cases where the interests in undivided shares are absolute but applies when there is any present interest held in undivided shares. For example, it has been held to apply where immediately before January 1, 1926—

(a) land was held in trust as to three undivided fourths for three life tenants and as to the other undivided fourth for a deceased life tenant's children absolutely (*Re Myhill*, [1928] Ch. 100);

(b) land was held upon trust to pay the rent and profits to X and Y in equal shares during their joint spinsterhoods and upon the death or marriage of X or Y to pay the whole income to the sole unmarried survivor during her spinsterhood (*Re Dawson's S. E.*, [1928] Ch. 421);

(c) land was held upon trust to divide the income during a long period (which had not then ended) amongst a class of persons and their executors, etc., with a limitation over upon trust for sale at the end of that period (*Re Robins*, [1928] Ch. 721);

(d) land was held upon trust to divide the income arising therefrom among ten children of a testator, seven grandchildren (children of deceased children of the testator) and the personal representatives of a deceased grandchild, with limitations over upon trust for sale (*Re Higgs and May's Contract*, [1927] 2 Ch. 249).

A similar point arose in *Re House*, [1929] 2 Ch. 166, where, by a will coming into operation after 1925, land was vested in trustees upon trust to pay four annuities and, while any such annuity was payable, upon trust to divide the surplus income amongst a class in equal shares, and after the cesser of the annuities upon trust for a larger class. It was held that the land was held in equity in undivided shares.

Land held upon trust for persons as part of their partnership property is land held in equity in undivided shares for the purpose of para. 1. This had been doubted, but it was so held in *Re Fuller's Contract*, [1933] Ch. 652, where the limitation was to six persons (of whom on January 1, 1926, three were living) " as joint tenants on trust for themselves, their executors administrators and assigns as part of their co-partnership estate ". (As to partnership land see head K below.)

Where land was originally settled in moieties but the moieties have become united before January 1, 1926, Part IV does not apply. This was decided in *Re Egton S. E.*, [1931] 2 Ch. 180, the facts of which were that by a voluntary settlement of 1909 an undivided half share in land was settled upon the usual limitations of a strict settlement, and the settlor, having subsequently acquired the other half share, settled it by his will upon the same trusts and with the same trustees as the 1909 settlement. The settlor died in 1910, and immediately before January 1, 1926, the life tenant under both settlements enjoyed both undivided half shares together. The Court held that, as the undivided shares had become united, Part IV was inapplicable. With *Re Egton S. E.* should be contrasted *Re Hayward*, [1928] Ch. 367, where three groups of undivided shares (the three groups together constituting the entirety) were held by A and B as trustees under three different instruments with different beneficial limitations. In this case it appears to have been assumed that there had been no merger of the

legal estates but that Part IV applied and the entirety vested in the Public Trustee under para. 1, sub-para. (4) (see also § 3 (iv) below).

A doubtful case is where immediately before January 1, 1926, land was vested in one person of full age subject to a widow's right of dower not assigned by metes and bounds. It is, however, generally considered that this case does not fall within Part IV of the First Schedule. (Wolstenholme and Cherry's *Conveyancing Statutes* (12th ed), p. 941; *Halsbury's Laws of England* (Hailsham ed.), Vol. 27, pp. 629 and 721, and see 70 S. J. 723). No difficulty arises where the person entitled to the land subject to the right of dower not assigned by metes and bounds is an infant, as that case is expressly dealt with in section 1 (3) of the S. L. A. 1925, the land then being settled land.

It has also been doubted whether land vested in co-parceners immediately before January 1, 1926, falls within Part IV, but the probability is that it does (see discussion at head A above).

A peculiar case noted here is *Re Harding*, [1934] Ch. 271, where it was held that the proceeds of sale of an undivided share in land, which had been sold prior to 1926, were not themselves " an undivided share in land " within Part IV, even though under section 123 of the Lunacy Act, 1890, they retained their character as land and passed to the heir-at-law of the lunatic under section 51 (2) of the A. E. A. 1925.

(iii) " *Vested in possession* ".

This covers two points, *viz.*: (a) the absence of any antecedent freehold estate, and (b) the present immediate beneficial enjoyment by possession, actual or notional (*per* Russell, J., in *Re Earl of Stamford and Warrington*, [1927] 2 Ch. at pp. 221 and 222).

Three cases are noted :—

(1) *Re Earl of Stamford and Warrington*, [1927] 2 Ch. 217. Here the entirety of the land stood limited, immediately before January 1, 1926, to trustees for a term of 1,000 years with a power to sell. During the continuance of the term the trustees were entitled to the rents and profits of the estate, which were applied in paying off incumbrances. Subject to this term, X and Y were each entitled to a life interest in an undivided moiety of the estate. It was held that the case did not fall within para. 1 of Part IV as the subsistence of the 1,000 year term prevented the undivided shares of X and Y from being " vested in possession ". The Court further held that, as the land was settled by will, the legal estate vested in the trustees of the will as statutory owners under section 23 of the S. L. A. 1925, there being in the circumstances no tenant for life or person having the powers of a tenant for life under section 20 of the S. L. A. 1925.

(2) *Re Stevens and Dunsby's Contract*, [1928] W. N. 187. Here immediately before January 1, 1926, land stood limited by a will upon trust to accumulate the income thereof and out of the accumulations to pay off certain mortgages and, after the mortgages had been paid off, to divide the net income thereof equally among the testator's grandchildren. The mortgages had not been paid off by January 1, 1926. It was held that

the case did not fall within para. 1 of Part IV, as the subsisting trust to accumulate prevented the interests in undivided shares from being " vested in possession ". The Court further held that the land was settled land and that the grandchildren had the powers of a tenant for life under section 20 (1) (viii) of the S. L. A. 1925.

(3) *Re Bird*, [1927] 1 Ch. 210. In this case immediately before January 1, 1926, land stood limited under a will in trust for all the children of X who being sons should attain the age of twenty-one, or being daughters should attain the age of twenty-one or marry under that age. There were three children, of whom on January 1, 1926, one only had attained twenty-one. The Court held that the land was settled land under section 1 (1) (iii) of the S. L. A. 1925, the provisions of which applied to the eldest son, as he would, in the event of the other children dying before they attained the age of twenty-one, become entitled in fee simple to the entirety. The eldest son, who had become entitled in possession to one undivided third share, could not, however, be brought within the category of tenant for life of the land, as an " undivided share " is excluded from the definition of " land " in section 117 (1) (ix) of the S. L. A. 1925. Consequently the legal estate vested in the trustees of the will as statutory owners.

In each of these cases the Court took the view that the land was not vested in undivided shares *in possession*. What would have been the position in *Re Bird* if two out of the three children had attained twenty-one before January 1, 1926, seems doubtful, as there would have been two undivided shares vested in possession. It has been suggested that such a case may fall within para. 2 of Part IV, where the land is not settled, but normally the land would be settled land in such a case (see head E (iii) and (iv) below). Probably, however, the case would be within para. 1. (See *Williams on Title* (ed. 1948), p. 331.)

(iv) *Interests subject to annuities.*

Where immediately before 1926 land was limited in undivided shares but subject to annuities, the annuities alone would not, *prima facie*, prevent the undivided shares from being vested in possession, but such annuities would be incumbrances and the provisions of Part IV of the First Schedule concerning incumbrances would apply to them. Thus in *Re Pedley*, [1927] 2 Ch. 168, land was held by trustees immediately before January 1, 1926, upon trust to pay an annuity of £500 to X for life and subject thereto upon trust for four persons in equal shares. It was held there (a) that the land was held in undivided shares vested in possession; (b) that the annuity was an " incumbrance " within section 205 (1) (vii) of the L. P. A. 1925; (c) that (the legal estate being by virtue of sub-para. (1) of para. 1 of Part IV held by the trustees upon the statutory trusts) the incumbrance was divested under sub-para. (1) (*a*) of para. 1, but that (d) the consent of the annuitant to any sale under the statutory trusts would have to be obtained under para. 1, sub-para. (9) of Part IV. Points (b)—(d) are more fully discussed below. See also *Re House*, [1929] 2 Ch. 166 above.

The position would not appear to be different if immediately before

1926 the annuities in fact exhausted all the income of the land upon which they were charged. Although the persons entitled in undivided shares subject to the annuities would in fact be receiving no income from the land at all, they would still be entitled " in possession ", as section 205 (1) (xix) of the L. P. A. defines " possession " as including the right to receive the rents and profits, if any, *i.e.*, they would have been entitled to receive the surplus rents, if there had been any.

§ 2. *Outline of the Vesting Provisions contained in* SUB-PARAGRAPHS (1)—(4)

Sub-paras. (1)–(4) provide for the vesting of the legal estate in the four separate sets of circumstances outlined below, where land was held in undivided shares vested in possession immediately before January 1, 1926 :—

(1) *Sub-para. (1)* applies where the entirety of the land was vested in trustees or personal representatives and provides that the trustees or personal representatives shall hold the land upon the statutory trusts;

(2) *Sub-para. (2)* applies where the entirety (not being settled land) was vested absolutely and beneficially in not more than four persons of full age (but free from incumbrances affecting undivided shares) and provides that such persons shall hold the land as joint tenants upon the statutory trusts;

(3) *Sub-para. (3)* applies where the entirety of the land is settled land held under one and the same settlement and provides that the entirety shall vest in the trustees of the settlement as joint tenants upon the statutory trusts, but if there are no such trustees, then in the Public Trustee upon the statutory trusts;

(4) *Sub-para. (4)* applies to any case not covered by the foregoing sub-paras. and provides that the land shall vest in the Public Trustee upon the statutory trusts.

These sub-paras. have to be applied successively to the facts of each particular case, so that if sub-para. (1) applies to a particular case, the legal estate will vest under that sub-para., even if another sub-para. could apply to the case on its facts. It is, of course, obvious that sub-para. (4) is residuary and only applies where sub-paras. (1)–(3) are inapplicable, but the necessity for the successive application of the sub-paras. (1)–(3) arises because of the fact that sub-paras. (1) and (3) overlap somewhat, as a case may occur where the entirety of the land is settled land held under one and the same settlement (sub-para. (3)) and at the same time the entirety is vested in trustees (sub-para. (1)). These facts actually occurred in *Re Dawson's S. E.*, [1928] Ch. 421, where immediately before January 1, 1926, land was held by a trustee upon trust to pay the rents and profits to X and Y in equal shares during their joint spinsterhoods and upon the death or remarriage of X or Y to pay the whole income to the sole unmarried survivor during her spinsterhood. Accordingly the entirety of the land was vested in a trustee,—thus bringing it within sub-para. (1), and was also settled land held under one and the same settlement,—thus bringing it within sub-para. (3). The Court held that sub-para. (1) applied and that reference to sub-para. (3) was unnecessary.

§ 3. *Vesting of land held by Trustees or Personal Representatives*

SUB-PARAGRAPH (1)

Sub-para. (1) is as follows :—

"If the entirety of the land is vested in trustees or personal representatives (whether subject or not to incumbrances affecting the entirety or an undivided share) in trust for persons entitled in undivided shares, then—

(a) if the land is subject to incumbrances affecting undivided shares or to incumbrances affecting the entirety which under this Act or otherwise are not secured by legal terms of years absolute, the entirety of the land shall vest free from such incumbrances in such trustees or personal representatives and be held by them upon the statutory trusts; and

(b) in any other case the land shall be held by such trustees or personal representatives upon the statutory trusts;

subject in the case of personal representatives to their rights and powers for the purposes of administration."

The following points upon sub-para. (1) are noted:—

(i) *Example.* Sub-para. (1) covers the case where immediately before January 1, 1926, land was vested in X and Y as trustees upon trust for A and B as tenants in common, or where land was held by X and Y as personal representatives of a testator who had died before 1926, but X and Y had not prior to January 1, 1926, assented to the land vesting in A and B who were entitled under the will as tenants in common.

(ii) *"Persons entitled in undivided shares"—limited interests.* It also applies where the entirety, being vested in trustees or personal representatives, was held on trust for persons in undivided shares and the interests of such persons were limited and not absolute interests, for the words "persons entitled in undivided shares" in sub-para. (1) are not confined to persons absolutely entitled. So held in *Re Myhill*, [1928] Ch. 100, where immediately before 1926 land was vested in the trustee of a will upon trust as to three undivided fourths for A, B and C as life tenants with remainders to their respective children and as to the other undivided fourth share for the children of D (a deceased life tenant) absolutely, and on these facts the Court held that sub-para. (1) applied. As explained above (§ 2), so long as the entirety was vested in trustees or personal representatives, the case will still fall within sub-para. (1), even if the entirety was settled land held under one and the same settlement (*Re Dawson's S. E.*, [1928] Ch. 421). Where, however, the entirety was settled land held under one and the same settlement, it is important to remember that the provisions of para. 4 may apply so as to take the case out of para. 1 altogether (for para. 4 see head G below). This will, of course, depend on the particular facts of the case.

(iii) *"Trustees or personal representatives" — sole trustee.* Although sub-para. (1) refers to "trustees or personal representatives", it was held in *Re Myhill* that the plural includes the singular (section 1 (1) (*b*) of the Interpretation Act, 1889) and that

sub-para. (1) applies even if there is only one trustee or personal representative in whom the land was vested. Compare *Re Price, Price* v. *Price*, [1929] 2 Ch. 400, where a different interpretation was given to "trustees" in sub-para. (3), as that sub-para. speaks of the land vesting in trustees "as joint tenants". There does not appear to be any upper limit to the number of trustees in whom the land may vest under sub-para. (1), though of course section 34 (1) of the Trustee Act, 1925, will apply.

(iv) *Undivided shares held by same trustees on different trusts.* Where a number of undivided shares, together constituting the entirety, were vested in the same trustees but were held by them upon different trusts under different instruments, it was assumed (though not decided) in *Re Hayward*, [1928] Ch. 367, that sub-para. (1) did not apply but that the case fell within sub-para. (4) and that the legal estate vested in the Public Trustee. This has, however, been doubted. For arguments see 65 L. J. Newsp. pp. 136, 180, 190 and 238; 71 L. J. Newsp. p. 389; 72 S. J. p. 346; 13 *Conveyancer* (o.s.) p. 85, and 15 *Conveyancer* (o.s.) p. 84.

(v) *Merger.* As to the possibility of the merger of the interests, see *Re Egton S. E.*, [1931] 2 Ch. 180, and observations at § 1 (ii) above.

(vi) *Undivided shares held by different trustees.* If one undivided half share is vested in A on trust for sale and the other undivided half share in B on trust for sale, it would not seem possible to treat A and B together as trustees of the entirety under sub-para. (1), and the case would fall under sub-para. (4). See *Re Stamford and Warrington*, [1927] 2 Ch. 217, where, on different facts, the Court refused to add together two undivided half shares held on different beneficial trusts and treat them notionally as the entirety. Similarly also if land were vested in A and B as tenants in common at law upon trust for C absolutely (see 73 L. J. Newsp. 42).

(vii) *Undivided shares held by trustees who are also beneficial owners.* Difficulties may arise in cases where one or more of the trustees in whom the legal estate was vested immediately prior to January 1, 1926, were also beneficial owners. The application of sub-para. (1) would then turn on whether the legal interest of the trustee had been merged in the beneficial interest. If, for instance, A held the legal estate upon trust for A, B and C as tenants in common, then, in the absence of the merger of A's beneficial interest in his legal estate, sub-para. (1) would apply. This view appears to have been acted on without argument in *Re Collins*, [1929] 1 Ch. 201. If, however, there had been a merger prior to 1926, then A would have held the one share as absolute owner and the other two shares as trustee for B and C, and the case would fall within sub-para. (4). For a full discussion see 72 S. J. 639.

(viii) *Doubtful cases.* Where by virtue of sub-para. (1) land is held by personal representatives upon the statutory trusts, a number of difficult problems may arise to which no certain answers can be given :—

(a) *The non-proving executor.* The first problem concerns the non-proving executor and arises in this way. "Personal representative" in the L. P. A. 1925, means "the executor, original or by representation, or administrator for the time

being of a deceased person" (section 205 (1) (xviii)) and in the Land Transfer Act, 1897, "an executor or administrator" (section 24). In neither definition is the non-proving executor excluded. Under section 1 of the Land Transfer Act, 1897, on the death of a testator, his real estate vested in his personal representatives and in the case of *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58, it was held that this phrase included all the executors appointed by the testator's will, whether they proved the will or not, with the consequence that the proving executors could not dispose of the real estate without the concurrence of the non-proving executor. This particular difficulty was surmounted by section 12 of the Conveyancing Act, 1911, which enabled the proving executors alone to make a valid transfer. Section 8 (1) of the A. E. A. 1925, now provides that where probate is granted to some only of the executors named in a will, all the powers which are by law conferred on the personal representative may be exercised by the proving executors alone. In view, however, of the definition in section 205 (1) (xviii) of the L. P. A. and of the decision in *Re Pawley and London and Provincial Bank*, it would seem that in sub-para. (1) of para. 1 of Part IV, "personal representatives" must include the non-proving as well as the proving executors and that the vesting under that sub-para. must be in favour of all the personal representatives upon the statutory trusts. Section 8 (1) of the A. E. A. hardly surmounts the difficulty since the statutory trusts imposed by sub-para. (1) of para. 1 of Part IV are not very aptly described as falling within "the powers which are by law conferred on the personal representative". Section 2 (2) of the A. E. A., which empowers the proving executors to convey the real estate of the testator without the concurrence of the non-proving executors, does not apply in the case of pre-1926 deaths (unlike section 8 (1)) and in consequence does not help in the present difficulty. The only way out of the difficulty, it would seem, is to argue that the words at the end of sub-para. (1) of para. 1 of Part IV, *viz.*: "subject in the case of personal representatives to their rights and powers for the purpose of administration", entitle the proving executors alone to exercise the statutory trusts in reliance on section 8 (1) of the A. E. A. This is by no means certain, however, as where there are statutory trusts, *prima facie* they can only be effectively exercised by all the trustees acting together.

(b) *Executors renouncing probate.* Another problem arises where all the executors named in the will have renounced probate. If, prior to January 1, 1926, administration with the will annexed has been granted to the residuary legatees, no difficulty arises since those administrators will, immediately before the coming into force of the Act, be the personal representatives for the purpose of sub-para. (1) of para. 1 of Part IV. If, however, administration is not granted until after December 31, 1925 (renunciation having taken place on or before that date), or if both renunciation and the grant of administration take place

after December 31, 1925 (the death of the testator having occurred on or before that date), the position is obscure. If renunciation has taken place prior to 1926 it would seem possible that the legal estate in land vested in the heir, who would hold it upon trust for the persons entitled under the will and would by virtue of sub-para. (1) of para. 1 of Part IV hold it upon the statutory trusts. Upon the appointment of administrators subsequent to December 31, 1925, it is not clear that there would be any vesting of the legal estate in them. If renunciation takes place after December 31, 1925 (the death of the testator having taken place before that date), it is clear that, upon the coming into force of the L. P. A., the executors named in the will (who derive their title from the will and not from the probate) would have become statutory trustees under sub-para. (1) of para. 1 of Part IV. Whether persons upon whom trusts have been imposed by statute can disclaim such trusts is, however, not free from doubt. Even assuming that such disclaimer is possible and that the renunciation of probate operates as a disclaimer of the statutory trusts, the devolution of the legal estate is uncertain, as there is no provision for its automatic vesting in any administrators subsequently appointed. Whether it would vest in the Probate Judge under section 9 of the A. E. A. 1925, and then in the administrators as a result of the operation of section 5 of the A. E. A. is not clear. (For a full discussion of this problem see 74 S. J. 259 and 80 S. J. 258.)

(c) *Devolution of legal estate held by personal representatives.* Analogous to these problems is the question of the devolution of the legal estate held by personal representatives upon the statutory trusts under sub-para. (1) of para. 1 of Part IV. If the effect of sub-para. (1) is to convert the personal representatives into statutory trustees, then presumably the legal estate will devolve on the personal representatives of the last survivor under section 18 (2) of the Trustee Act, 1925. If this is not the true view, there may be a break in the chain of representation and a grant *de bonis non* would be necessary. The problem could, however, only arise in the case of an unadministered estate where, apart from Part IV, the personal representatives had not become trustees. In order to obviate any difficulty, personal representatives who retained that capacity after 1925 should have executed an assent to the vesting of the property in themselves as trustees upon trust for sale (see 171 L. T. Journal, p. 411).

The problems discussed above represent aspects of the question of the paramountcy of the statutory trusts created by Part IV, a matter discussed at head H (iii) below.

(ix) "*Incumbrances*". The general L. P. A. definition of "incumbrance" is given in section 205 (1) (vii) which provides that "incumbrance" includes a legal or equitable "mortgage and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum". For the purposes of Part IV, however,

the word "incumbrance" is limited to exclude a "legal rentcharge affecting the entirety, land tax, tithe rentcharge or any similar charge on the land not created by an instrument" (see para. 1, sub-para. (12)). In the case of *Re Pedley*, [1927] 2 Ch. 168, an annuity was held to be an incumbrance within sub-para. (1), but a power to charge a capital sum was held not to be an incumbrance, as it might never be exercised.

(x) *The "statutory trusts"*. The nature and effect of the statutory trusts created under (*inter alia*) sub-para. (1) are discussed at head H below.

§ 4. *Vesting of land held by Beneficial Owners*

SUB-PARAGRAPH (2)

Sub-para. (2) is as follows:—

"If the entirety of the land (not being settled land) is vested absolutely and beneficially in not more than four persons of full age entitled thereto in undivided shares free from incumbrances affecting undivided shares, but subject or not to incumbrances affecting the entirety, it shall, by virtue of this Act vest in them as joint tenants upon the statutory trusts".

The following points are noted:—

(i) *Example.* This sub-para. applies where (for instance) immediately before 1926 A, B and C (being of full age) were absolutely and beneficially entitled to land in possession as tenants in common, neither of them having incumbered his share. If, however, there were more than four beneficial tenants in common, or if one of them was an infant (but as to this point see (vi) below), or if one of them had mortgaged his share, sub-para. (2) does not apply but the entirety vests in the Public Trustee under sub-para. (4).

(ii) *Entirety vested in trustees.* Sub-para. (2) does not apply if the entirety is vested in trustees or personal representatives. Such a case would fall within sub-para. (1) in consequence of the rule in *Re Dawson's S. E.*, [1928] Ch. 421.

(iii) *Settled land.* Nor does sub-para. (2) apply if the entirety is settled land. Here "settled land" means land which was "settled" within the meaning of the Settled Land Acts, 1882–1890. This was decided in *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62, where land was vested in A, B and C as tenants in common subject to but with an indemnity against a jointure rentcharge. Such land is "settled land" under section 1 (1) (v) of the S. L. A. 1925, but was not settled land under the old S. L. Acts. The Court held that as para. 1 applies to the circumstances in existence "immediately before the commencement" of the Act, the land was not settled land for the purpose of para. 1 and hence the case fell within sub-para. (2) and not sub-para. (3). Accordingly the entirety vested in A, B and C subject to the incumbrance (the jointure rentcharge). This reasoning would presumably also apply to a case where married women of full age were entitled as tenants in common in fee simple but subject to a restraint

on anticipation (see per Sargant, L.J., in *Re Ryder and Steadman's Contract*, [1927] 2 Ch. at p. 83).

(iv) *Incumbrances.* It should be noted that sub-para. (2) does not apply if there are incumbrances affecting undivided shares. If it had done so, the owners of the equities of redemption might have been enabled to defeat mortgages of the undivided shares. The application of the sub-para. is not, however, prevented by the existence of a mortgage of the entirety.

(v) *Doubtful case.* If immediately before January 1, 1926, land was vested as to one undivided half share in A absolutely and as to the other undivided half share in A as trustee for B (of full age), it is thought that the case cannot be brought under sub-para. (2) as being one where the entirety was vested "absolutely and beneficially" in A and B, but must be regarded as falling under sub-para. (4).

(vi) *Infant tenant in common.* Another difficult case occurs where immediately before January 1, 1926, one or more of the absolute beneficial owners entitled in undivided shares was an infant. Such a case clearly does not fall under sub-para. (2) as that sub-para. specifically requires the beneficial owners to be of full age. It would, therefore, be natural to suppose that the case came within sub-para. (4) and that the legal estate vested in the Public Trustee, sub-para. (4) being the residuary sub-para. in para. 1 and intended to cover any case to which the provisions of sub-paras. (1)–(3) do not apply. This appears to be the generally accepted view (see Emmet, *Notes on Perusing Title*, 12th ed., Vol. 1, p. 627, and Gibson's *Conveyancing*, 15th ed., p. 684). It is pointed out, however, that such a case equally falls under para. 4 of Part III of the First Schedule to the L. P. A. ("Provisions as to legal estate vested in Infant"). Para. 4 provides that: "Where, immediately before the commencement of this Act, a legal estate in land is vested in two or more persons jointly as . . . trustees . . ., and any one of them is an infant, or *where immediately after the commencement of this Act a legal estate in land would, by virtue of this Act or otherwise have been so vested if the infant were of full age*, the legal estate . . . shall by virtue of this Act vest in the other person or persons of full age. . . ." To take an example: Immediately before January 1, 1926, land is held beneficially and absolutely by A, B and C as tenants in common, but C is an infant. In such a case the legal estate would, under sub-para. (2) of para. 1 of Part IV, have vested in A, B and C as joint tenants *upon the statutory trusts*, had C been of full age. Such a case, therefore, clearly comes within the italicised words in the above quoted extract from para. 4 of Part III, which would, consequently, operate to vest the legal estate in A and B. It seems quite impossible to determine with certainty whether, in such a case, the legal estate would vest in the Public Trustee under sub-para. (4) of para. 1 of Part IV or in A and B under para. 4 of Part III.

The overlapping of Parts III and IV in this way appears to create an insoluble problem. It is thought possible, however, that a Court may be inclined in such a case to limit para. 4 of Part III to cases where the trust was in existence prior to January 1, 1926, and not to apply it to a case where the Act itself created the trust. If so, the legal estate would vest in the Public Trustee under Part IV.

§ 5. *Vesting of Settled Land*

SUB-PARAGRAPH (3)

(1) *Vesting in the Trustees of the Settlement*

Sub-para. (3) is as follows:—

"If the entirety of the land is settled land (whether subject or not to incumbrances affecting the entirety or an undivided share) held under one and the same settlement, it shall, by virtue of this Act, vest, free from incumbrances affecting undivided shares, and from incumbrances affecting the entirety, which under this Act or otherwise are not secured by a legal [mortgage, and free from any interests, powers, and charges subsisting under the settlement, which have priority to the interests of the persons entitled to the undivided shares], in the trustees (if any) of the settlement as joint tenants upon the statutory trusts".

Then follows a proviso, set out in full below, and enacting that if there are no such trustees the entirety shall vest in the Public Trustee.

The following points are noted:—

(i) *L. P. (Amdt.) Act.* The words in square brackets above were substituted by the L. P. (Amdt.) Act, 1926, for the words "term of years absolute".

(ii) *Scope of sub-para. (3)—examples. Prima facie* sub-para. (3) covers the settled land cases but in actuality its scope is considerably narrowed by

(a) the rule in *Re Dawson's S. E.*, [1928] Ch. 421, which operates to exclude from sub-para. (3) cases where the entirety was vested in trustees or personal representatives immediately before the commencement of the Act (such cases falling within sub-para. (1));

(b) para. 4, which contains special provisions applicable to certain cases where after the cesser of life interests in undivided shares, the entirety is limited so as to devolve together (see head G below).

Sub-para. (3) would, however, cover most of the ordinary settled land cases where the legal estate was split up between the life tenants and the persons entitled in remainder and not vested in trustees (a state of affairs common before 1926). Thus where immediately before 1926 land settled under one and the same settlement was vested in possession in A, B and C, daughters of the settlor, as tenants in common in tail with cross remainders over, the entirety would vest in the trustees of the settlement under sub-para. (3). Another case falling within sub-para. (3) is where immediately before January 1, 1926, land was under one and the same settlement limited in possession to A and B for life as tenants in common with remainder to A in fee simple (this case does not fall within para. 4—see head G (ii) (c) below).

(iii) "*Settled land*"—*meaning.* In sub-para. (3), as in sub-para. (2), "settled land" means "settled land within the S. L. Acts 1882–1890"—see *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62, discussed at § 4 (iii) above.

(iv) "*Trustees of the settlement*". Similarly "trustees (if any) of the settlement" means trustees for the purpose of the S. L. Acts,

1882–1890. This point was decided in *Re Catchpool*, [1928] Ch. 429, where it was held that the personal representative of the last surviving trustee was not a "trustee of the settlement" under sub-para. (3) because he would not have been a trustee under the old S. L. Acts, although he would be a trustee of the settlement under section 30 (3) of the S. L. A. 1925.

(v) "*Trustees . . . as joint tenants*"—*sole trustee.* The phrase "trustees (if any) of the settlement as joint tenants" does not include a sole trustee. This was decided in *Re Price*, *Price* v. *Price*, [1929] 2 Ch. 400, where it was held that the use of the words "as joint tenants" constitutes a contrary intention for the purpose of section 1 of the Interpretation Act, 1889, and so excludes the rule that the plural includes the singular. Contrast the decision in sub-para. (1) (*Re Myhill*, [1928] Ch. 100) where the words "as joint tenants" do not appear (see § 3 (iii) above).

(2) *The proviso—vesting in the Public Trustee*

The proviso to sub-para. (3) is as follows:—

"Provided that if there are no such trustees, then—

(i) pending their appointment, the land shall, by virtue of this Act, vest (free as aforesaid) in the Public Trustee upon the statutory trusts;

(ii) the Public Trustee shall not be entitled to act in the trust, or charge any fee, or be liable in any manner, unless and until requested in writing to act by or on behalf of persons interested in more than an undivided half of the land or the income thereof;

(iii) after the Public Trustee has been so requested to act, and has accepted the trust, no trustee shall (except by an order of the Court) be appointed in the place of the Public Trustee without his consent;

(iv) if, before the Public Trustee has accepted the trust, trustees of the settlement are appointed, the land shall, by virtue of this Act, vest (free as aforesaid) in them as joint tenants upon the statutory trusts;

(v) if, before the Public Trustee has accepted the trust, the persons having power to appoint new trustees are unable or unwilling to make an appointment, or if the tenant for life having power to apply to the Court for the appointment of trustees of the settlement neglects to make the application for at least three months after being requested by any person interested in writing so to do, or if the tenants for life of the undivided shares are unable to agree, any person interested under the settlement may apply to the Court for the appointment of such trustees".

The following points are noted:—

(i) *Appointment of new or additional trustees.* Where immediately before the commencement of the Act, there were not two or more trustees of the settlement, the land vested in the Public Trustee upon the statutory trusts. New or additional trustees may, before the Public Trustee has accepted the trust, be appointed by the person nominated in the settlement to appoint new trustees or by a sole continuing trustee (as in *Re Price, Price* v. *Price*, [1929] 2 Ch. 400). New or additional trustees

may also be appointed by the Court (as in *Re Catchpool*, [1928] Ch. 429). There is, however, in sub-para. (3) no provision entitling any persons interested in more than an undivided half of the land themselves to appoint new trustees (as there is in sub-para. (4)), though such persons may request the Public Trustee to act in the trust. This distinction between sub-para. (3) and sub-para. (4) should be noted.

(ii) "*Trustees of the settlement*". Where new trustees are appointed under sub-para. (3), they are, by virtue of the proviso set out above, "trustees of the settlement" notwithstanding that when they are appointed any settlement will in fact have come to an end, as the land will already have vested in the Public Trustee upon the statutory trusts. The fact that the settlement has thus come to an end and the S. L. Acts, 1882–1890, have been repealed does not prevent the appointment of S. L. A. trustees for the purposes of sub-para. (3).

(iii) "*Person interested*". The phrase "person interested" in the land would appear to include a trustee as well as a person beneficially entitled. The reasoning of *Re Cliff Contract*, [1927] 2 Ch. 94 (a decision upon sub-para. (4)—see § 6 (ii) below) presumably applies to sub-para. (3) as well as to sub-para. (4).

(iv) *Additional or larger powers.* Where the entirety vests in the trustees of the settlement upon the statutory trusts they may exercise all the additional or larger powers (if any) conferred by the settlement on the tenant for life, statutory owner or trustees of the settlement (see section 28 (1) of the L. P. A.).

§ 6. *Vesting in other cases. The residuary sub-paragraph*

SUB-PARAGRAPH (4)

Vesting in the Public Trustee

Sub-para. (4) is as follows:—

"In any case to which the foregoing provisions of this part of this Schedule do not apply, the entirety of the land shall vest (free as aforesaid) in the Public Trustee upon the statutory trusts".

Then follows a proviso set out below.

Examples. This sub-para. covers a great variety of cases, such as:—

(a) cases in which the land is vested in trustees but where the entirety is not vested in one set of trustees and in consequence sub-para. (1) is not applicable, *e.g.*, where one undivided half share is vested in A and B on trust for sale and another undivided half share in X and Y on trust for sale;

(b) cases where there are absolute beneficial tenants in common but where sub-para. (2) is inapplicable because there are, *e.g.*, more than four beneficial owners, or one of the beneficial owners is an infant (but as to this case see § 4 (vi) above), or one or more of the beneficial owners have incumbered their undivided shares;

(c) cases where the undivided shares, or some of them, are settled but the entirety is not settled under one and the same settlement (sub-para. (3)) or the entirety is not vested in one set of trustees or personal representatives (sub-para. (1)).

The proviso to sub-para. (4) is as follows:—

" Provided that—

(i) The Public Trustee shall not be entitled to act in the trust, or charge any fee, or be liable in any manner, unless and until requested in writing to act by or on behalf of the persons interested in more than an undivided half of the land or the income thereof;

(ii) After the Public Trustee has been so requested to act, and has accepted the trust, no trustees shall (except by an order of the Court) be appointed in the place of the Public Trustee without his consent;

(iii) Subject as aforesaid, any persons interested in more than an undivided half of the land or the income thereof may appoint new trustees in the place of the Public Trustee with the consent of any incumbrancers of undivided shares (but so that a purchaser shall not be concerned to see whether any such consent has been given) and [thereupon the land shall by virtue of this Act vest] in the persons so appointed (free as aforesaid) upon the statutory trusts; or such persons may (without such consent as aforesaid), at any time, whether or not the Public Trustee has accepted the trust, apply to the Court for the appointment of trustees of the land, and the Court may make such order as it thinks fit, and if thereby trustees of the land are appointed, the same shall by virtue of this Act, vest (free as aforesaid) in the trustees as joint tenants upon the statutory trusts;

(iv) If the persons interested in more than an undivided half of the land or the income thereof do not either request the Public Trustee to act, or (whether he refuses to act or has not been requested to act) apply to the Court for the appointment of trustees in his place, within three months from the time when they have been requested in writing by any person interested so to do, then and in any such case, any person interested may apply to the Court for the appointment of trustees in the place of the Public Trustee, and the Court may make such order as it thinks fit, and if thereby trustees of the land are appointed the same shall by virtue of this Act, vest (free as aforesaid) in the trustees upon the statutory trusts ".

The following points are noted :—

(i) *L. P. (Amdt.) Act.* The words in square brackets in sub-para. (4), proviso (iii) were substituted by the L. P. (Amdt.) Act, 1926, for the words " vest the land ". Consequently no vesting declaration need be contained or implied in the appointment of new trustees, as the vesting takes place by virtue of the Act.

(ii) " *Persons interested* ". The words " persons interested in more than an undivided half of the land " (in proviso (iii)) include persons who at the end of 1925 were trustees for sale of more than an undivided half share. This was decided in *Re Cliff Contract*, [1927] 2 Ch. 94, where land was divided into four equal undivided shares and an appointment of trustees under proviso (iii) made by the absolute owner of one fourth share and by trustees for sale of the remaining three shares was held to be a valid appointment. There is some doubt whether " persons

interested" means persons interested immediately before January 1, 1926, or persons interested at the time of the appointment; probably the latter view is correct, as the former would tend to defeat the operation of the provision where the appointment is made some time after 1925 and some or all of the "persons interested" immediately before January 1, 1926, had died.

(iii) *Consent of incumbrancers.* The consent of incumbrancers of undivided shares (but not of incumbrancers of the entirety) is a prerequisite to the appointment of new trustees under proviso (iii), but a purchaser is protected by not being required to see whether such consent has been given. It is not clear whether the phrase "any incumbrancers of undivided shares" means all the incumbrancers of all the undivided shares or only all the incumbrancers of the undivided shares in right of which the appointment is being made (see 76 S. J. p. 260, and 186 L. T. Journal, p. 83). Nor is it clear what effect should be given to an appointment made without the consent of the appropriate incumbrancers. It has been suggested (72 S. J. p. 26) that an appointment made without the consent of incumbrancers is inoperative to cause the legal estate to vest under the Act in the new trustees (except, of course, in favour of a purchaser) and would not entitle the new trustees (for instance) to bring proceedings for ejectment against a tenant. A contrary view (72 S. J. p. 43) is that the appointment operates effectively to vest the legal estate in the new trustees but that it may be challenged in equity by an incumbrancer whose consent has not been obtained.

(iv) *Position of Public Trustee pending request to act.* Until the Public Trustee is requested to act in the trust, as specified in proviso (i), he may not act or charge any fee or be liable in any manner. Consequently it would seem that until the requirements of proviso (i) have been satisfied, the receipt by the Public Trustee of notices concerning dealings with beneficial interests would not give or preserve priority. In the case of *Blewitt* v. *Blewitt*, [1936] 2 All E. R. 188, however, where a lease had vested in the Public Trustee under sub-para. (4), but where it is not stated whether the Public Trustee had been requested to act or not, the view was expressed by Lord Wright, M.R., in the C. A., that a notice to repair under section 146 of the L. P. A. ought to have been served on the Public Trustee.

(v) *Competence of appointors to appoint themselves as trustees.* It has been doubted whether the persons appointing new trustees under proviso (iii) can properly appoint themselves, but in practice this has often been done and was in fact done in the case of *Re Cliff Contract*, [1927] 2 Ch. 94.

§ 7. *Consequential Provisions*

DIRECTIONS AS TO PAYMENT OF INCOME—SUB-PARAGRAPH (5)

EVIDENCE AS TO TITLE—SUB-PARAGRAPH (6)

Sub-para. (5) is as follows:—

"The vesting in the Public Trustee of land by virtue of this part of this Schedule shall not affect any directions previously given as to the payment of income or of interest on any mortgage money, but such

instructions may, until he accepts the trust, continue to be acted on as if no such vesting had been effected".

This sub-para. preserves the *status quo ante* January 1, 1926, so far as regards existing directions as to payment of income (*e.g.*, payment to or by a bank), pending the decision whether the Public Trustee is to be requested to act or whether new trustees are to be appointed in his place.

Sub-para. (6) is as follows:—

"The Court or the Public Trustee may act on evidence given by affidavit or by statutory declaration as respects the undivided shares without investigating the title to the land".

This sub-para. is self-explanatory.

§ 8. *Incumbrances*

SUB-PARAGRAPHS (7), (8), (9) AND (12)

(i) *Sub-para. (7) deals with an exceptional case and provides as follows:—*

"Where all the undivided shares in the land are vested in the same mortgagees for securing the same mortgage money and the rights of redemption affecting the land are the same as might have been subsisting if the entirety had been mortgaged by an owner before the undivided shares were created, the land shall, by virtue of this Act, vest in the mortgagees as joint tenants for a legal term of years absolute (in accordance with this Act) subject to cesser on redemption by the trustees for sale in whom the right of redemption is vested by this Act, and for the purposes of this Part of this Schedule the mortgage shall be deemed to be an incumbrance affecting the entirety".

(ii) *Example of application of sub-para. (7).* In order to understand the object of sub-para. (7) it should be realised that normally under para. 1 of Part IV *incumbrances affecting undivided shares* are divested by the operation of the para. and the legal estate vests in the statutory trustees free from such incumbrances. The incumbrances are, of course, enforceable against the proceeds of sale. *Incumbrances affecting the entirety* are dealt with differently by para. 1. Such incumbrances, if secured by a legal mortgage under the Act or otherwise, are not divested by the operation of para. 1, but the mortgagee acquires a legal term of years absolute by the operation of Parts VII or VIII of the First Schedule to the L. P. A., and the legal fee simple or head term vests in the appropriate persons upon the statutory trusts under para. 1 of Part IV but subject to the mortgage term. If, however, such incumbrances (*i.e.*, incumbrances affecting the entirety) are not secured by a legal mortgage, they are divested by the operation of para. 1 in the same manner as mortgages or other incumbrances of undivided shares (except in a case falling within sub-para. (2)). Sub-para. (7) deals with the exceptional case in which it is convenient to deal with mortgages of undivided shares as if they had been mortgages of the entirety. An example will illustrate this point. If immediately before January 1, 1926, land is vested in A, B and C (all of full age) as tenants in common in possession and A has mortgaged his share to X to secure £100, B has mortgaged his share to Y

to secure £100, and C has mortgaged his share to Z to secure £100, then the legal estate will vest in the Public Trustee under sub-para. (4) of para. 1 free from these incumbrances. (Note : It will not vest in A, B and C under sub-para. (2) because these are incumbrances affecting the undivided shares—see discussion at § 4 (iv) above.) This is the normal case. If, however, in the suggested case, instead of there being three separate mortgages of the several undivided shares in favour of X, Y and Z individually, A, B and C had before 1926 joined in *one* legal mortgage of *all three shares* in favour of X, Y and Z *jointly* to secure an advance of £300 *for their common benefit*, then the case would fall within sub-para. (7) with the following effects : (a) a legal term of years absolute would vest in X, Y and Z jointly, and (b) the legal fee simple (or head term) would vest in A, B and C as joint tenants upon the statutory trusts but subject to the mortgage term in favour of X, Y and Z. Point (b) should be noted. The vesting in A, B and C takes place under sub-para. (2) because by reason of sub-para. (7) the mortgage affecting the three undivided shares is deemed to be a mortgage affecting the entirety "*for the purposes of this Part of this Schedule*". Vesting may take place under sub-para. (2) when there are mortgages affecting the entirety but not when there are mortgages affecting the undivided shares—see § 4 (iv) above.

(iii) *Sub-para. (8) is as follows:—*

"This Part of this Schedule does not (except where otherwise expressly provided) prejudice incumbrancers whose incumbrances affect the entirety of the land at the commencement of this Act, but (if the nature of the incumbrance admits) the land shall vest in them for legal terms of years absolute in accordance with this Act, but not so as to affect subsisting priorities".

(iv) *Effect of sub-para. (8).* This sub-para. preserves the right of *incumbrancers of the entirety.* It may be convenient to tabulate here the ways in which the different kinds of incumbrances are treated under para. 1 of Part IV :—

(1) *Incumbrances affecting the entirety.* These fall into two classes, *viz.* :—

(a) *Incumbrances which under the Act or otherwise are secured by a legal mortgage (or legal term of years absolute).* These are not divested by Part IV at all, but the incumbrancers acquire legal terms of years under Parts VII or VIII of the First Schedule to the L. P. A. The actual words used in sub-paras. (1) and (3) to describe these incumbrances should be noted. The line is not drawn between legal and equitable mortgages subsisting on December 31, 1925, but between mortgages which *under the Act or otherwise* are secured by legal terms of years and mortgages or other incumbrances which are not so secured. A mortgage which was only equitable before January 1, 1926, may be converted into a legal mortgage by the operation of Part VII or Part VIII (see paras. 1 and 2 of Part VII and para. 2 of Part VIII). Although Part IV, para. 1, looks to the state of affairs in existence immediately before the coming into force of the Act (see § 1 (i) above), it is necessary to consider the effect of Parts VII and VIII upon a

particular incumbrance in order to determine whether para. 1 of Part IV will have a divesting effect.

(b) *Incumbrances which are not so secured.* These are divested in cases falling within sub-paras. (1), (3) and (4) of para. 1 but *not* in cases falling within sub-para. (2).

(2) *Incumbrances affecting the undivided shares.* These are divested in all cases except those falling within sub-para. (7) (discussed at (ii) above). The existence of incumbrances affecting the undivided shares does not interfere with the vesting of the legal estate under sub-paras. (1), (3) or (4) in cases falling within either of those sub-paras. It does, however, prevent the application of sub-para. (2) (see the illustration in (ii) above).

(v) *Sub-para. (9) is as follows:—*

"The trust for sale and powers of management vested in persons who hold the entirety of the land on trust for sale shall, save as hereinafter mentioned, not be exercisable without the consent of any incumbrancer, being of full age, affected whose incumbrance is divested by this Part of this Schedule, but a purchaser shall not be concerned to see or inquire whether any such consent has been given, nor, where the incumbrancer is not in possession, shall any such consent be required if, independently of this Part of this Schedule or any enactment replaced thereby the transaction would have been binding on him, had the same been effected by the mortgagor".

(vi) *Sub-para. (12) is as follows:—*

"In this Part of this Schedule 'incumbrance' does not include [a legal rentcharge affecting the entirety], land tax, tithe rentcharge, or any similar charge on the land not created by an instrument".

The words in square brackets were added by the L. P. (Amdt.) Act, 1926.

(vii) *Consents to exercise of trusts for sale, etc.* Sub-para. (9) is intended to protect the interests of the incumbrancer whose incumbrance is divested under the provisions of Part IV. It will be noted, however, that a purchaser is not concerned to see whether the incumbrancer's consent has been given. In connection with the application of sub-para. (9) the case of *Re Pedley*, [1927] 2 Ch. 168, is noted. In that case immediately before January 1, 1926, land was vested in trustees upon trust to pay an annuity of £500 to X for life, which annuity was determinable upon attempted alienation. X also had power to charge the land with the payment of £10,000 for the benefit of certain issue. Subject thereto, the trustees stood possessed of the land and of the income thereof in trust for four persons in equal shares. On these facts the Court held :—

(a) that the land was held in undivided shares vested in possession;

(b) that under sub-para. (1) the legal estate was vested in the trustees upon the statutory trusts, the incumbrances being divested under sub-clause (a) of that sub-para.;

(c) that the annuity was an incumbrance for the purpose of Part IV but that the power to charge (which might never be exercised) was not; and

(d) that the consent by the annuitant (under sub-para. (9)) to the

exercise of the trust for sale would not operate to forfeit the annuity.

§ 9. *Pending contracts and partition actions*

SUB-PARAGRAPHS (10) AND (11)

Sub-para. (10) is as follows:—

"This Part of this Schedule does not apply to land in respect of which a subsisting contract for sale (whether made under an order in a partition action or by or on behalf of all the tenants in common or co-parceners) is in force at the commencement of this Act if the contract is completed in due course (in which case title may be made in like manner as if this Act, and any enactment thereby replaced, had not been passed), nor to the land in respect of which a partition action is pending at such commencement if an order for a partition or sale is subsequently made in such action [within eighteen months from the commencement of this Act]."

The words in square brackets were added by the L. P. (Amdt.) Act, 1926.

Sub-para. (10) excepts from Part IV two separate cases :—

(a) cases where a contract of sale is subsisting on January 1, 1926, and is completed in due course;

(b) cases where a partition action is pending on January 1, 1926, and an order for partition or sale is made before July 1, 1927.

In order to make this exception fully effective to preserve the *status quo ante* January 1, 1926, it would seem that the sub-para. would have to be construed as an exception from the substantive provisions of the L. P. A. (especially section 1 (6)) as well as from Part IV of the First Schedule (see Williams' *Contract of Sale of Land*, pp. 231 *et seqq.*).

Sub-para. (11) deals further with pending partition actions by providing that the repeal of the enactments relating to partition (see the Seventh Schedule to the L. P. A.) shall be without prejudice to such pending actions. In addition it empowers the Court, upon the request of the person or persons interested individually or collectively in one half or upwards of the land to which the proceedings relate, to make an order staying the pending partition proceedings in whole or in part. As from the date of such order the land to which it relates becomes subject to Part IV of the First Schedule and the old partition enactments cease to apply thereto. The Court is expressly empowered by such order to appoint trustees of the land and thereupon the land vests in such trustees as joint tenants upon the statutory trusts. It was held in *Darlington* v. *Darlington*, [1926] W. N. 192, that trustees for sale of an undivided share sufficiently represented that share (apart from the persons beneficially entitled) for the purpose of applying to the Court for an order staying pending partition proceedings.

E. Undivided shares falling into possession on or after January 1, 1926, though created before that date

PARAGRAPH 2 OF PART IV OF THE FIRST SCHEDULE TO THE L. P. A.

Paragraph 2 is as follows:—

"Where undivided shares in land, created before the commencement of this Act, fall into possession after such commencement, and the land

is not settled land when the shares fall into possession, the personal representatives (subject to their rights and powers for purposes of administration) or other estate owners in whom the entirety of the land is vested shall, by an assent or conveyance, give effect to the foregoing provisions of this Part of this Schedule in like manner as if the shares had fallen into possession immediately before the commencement of this Act, and in the meantime the land shall be held on the statutory trusts ".

The following points are noted:—

(i) " *Fall into possession* ". " Possession " has the same meaning here as in para. 1. See *Re Earl of Stamford and Warrington*, [1927] 2 Ch. 217, at p. 221. This case is discussed above at head D, § 1 (iii).

(ii) " *Settled Land* "—*meaning.* In view of the fact that para. 2 applies to the state of affairs after January 1, 1926, it would appear that, on the reasoning of *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62 (discussed at head D, § 4 (ii) above), " settled land " ought to mean settled land within the S. L. A. 1925.

(iii) " *The land is not settled land when the shares fall into possession* ". These words were held in *Re Hind*, [1933] Ch. 208, to refer to the state of affairs *immediately before* the shares fell into possession. Thus when on January 1, 1926, land stood limited to A for life with remainder to B and C in undivided shares and the life tenant died in 1929, para. 2 does not apply, but the case falls within section 36 of the S. L. A. 1925, and the trustees of the settlement are entitled to have the land vested in themselves upon the statutory trusts (so held in *Re Cugny's Will Trusts*, [1931] 1 Ch. 305, followed in *Re Thomas*, [1939] 1 Ch. 513). In view of these decisions it is difficult to see in what circumstances para. 2 can ever apply, as normally where the undivided shares are created before 1926 and fall into possession after 1925, the land is bound to be settled land before the undivided shares fall into possession. Wolstenholme and Cherry's *Conveyancing Statutes* (12th ed.), p. 626, suggest, as an instance, a case where the land is vested in a corporation in fee simple with a right of reverter (*e.g.*, on dissolution of the corporation or the termination of the charitable trust not administered *cy-près*) and the persons interested in the right of reverter are entitled in undivided shares.

(iv) *Section 36 of the S. L. A. 1925—scope.* The normal case of undivided shares falling into possession after 1925, though created before 1926, falls within section 36 of the S. L. A. 1925, which is as follows :—

> " 36.—(1) If and when, after the commencement of this Act, settled land is held in trust for persons entitled in possession under a trust instrument in undivided shares, the trustees of the settlement (if the settled land is not already vested in them) may require the estate owner in whom the settled land is vested (but in the case of a personal representative subject to his rights and powers for the purpose of administration), at the cost of the trust estate, to convey the land to them, or assent to the land vesting in them as joint tenants, and in the meantime the land shall be held on the same trusts as would have been applicable thereto if it had been so conveyed to or vested in the trustees.

" (2) If and when the settled land so held in trust in undivided shares is or becomes vested in the trustees of the settlement, the land shall be held by them (subject to any incumbrances affecting the settled land which are secured by a legal mortgage, but freed from any incumbrances affecting the undivided shares or not secured as aforesaid, and from any interests, powers and charges subsisting under the trust instrument which have priority to the trust for the persons entitled to the undivided shares) upon the statutory trusts.

" (3) If the estate owner refuses or neglects for one month after demand in writing to convey the settled land so held in trust in undivided shares in manner aforesaid, or if by reason of his being outside the United Kingdom or being unable to be found, or by reason of the dissolution of a corporation, or for any other reason, the Court is satisfied that the conveyance cannot otherwise be made, or cannot be made without undue delay or expense, the Court may, on the application of the trustees of the settlement, make an order vesting the settled land in them on the statutory trusts.

" (4) An undivided share in land shall not be capable of being created except under a trust instrument or under the Law of Property Act, 1925, and shall then only take effect behind a trust for sale.

" (5) Nothing in this section affects the priority *inter se* of any incumbrances whether affecting the entirety of the land or an undivided share."

(6) [Sub-section (6) sets out the statutory trusts, and is parallel to section 35 of the L. P. A.].

" (7) The provisions of this section bind the Crown ".

In view of *Re Cugny's Will Trusts*, [1931] 1 Ch. 305 (see above), " settled land " in section 36 of the S. L. A. means land which was settled immediately before the trust for sale arises. Thus, where land is limited to A for life with remainder to B and C as tenants in common in fee simple and A's life interest terminates, section 36 applies and the trustees of the settlement are entitled to have the legal estate vested in them, notwithstanding that with the death of A the settlement has come to an end (*Re Thomas*, [1939] 1 Ch. 513). Although with the vesting in possession of the undivided shares (whether the interests of the persons entitled to the undivided shares be absolute or limited) the land ceases to be " settled land " in the normal sense, (for it is impossible for the land to be settled land after the undivided shares have become vested in possession, as a trust for sale is immediately imposed—see section 1 (7) of the S. L. A. 1925 (added by the L. P. (Amdt.) Act, 1926)), yet in spite of this fact the application of section 36 of the S. L. A. is not excluded. (Contrast the decision in *Re Bridgett and Hayes' Contract*, [1928] Ch. 163, on section 22 (1) of the A. E. A. 1925, where in view of the wording of that section the Court held that land which ceased to be settled on the death of a tenant for life was not " settled land " within that section.) For a discussion see 75 S. J. p. 184, 77 S. J. p. 439, and 71 L. J. Newsp. p. 373. Where, however, in a case like *Re Thomas*, the persons entitled in undivided shares have absolute vested interests and are of full age, they will be entitled to

require the legal estate to be vested in themselves (not exceeding four) as joint tenants upon trust for sale (section 3 (1) (*b*) (ii) of the L. P. A.) and such right of the absolute beneficial owners will have precedence over the right of the trustees of the settlement under section 36 of the S. L. A. (see 73 L. J. Newsp. p. 440).

(v) *Undivided shares in remainder.* The position of the undivided shares while they remain interests in remainder is not free from difficulty. There is nothing in Part IV of Schedule 1 to the L. P. A. to impose a trust for sale in the case of undivided shares in remainder subsisting at the commencement of the Act and presumably they subsist as equitable interests in land until they fall into possession, in which event section 36 of the S. L. A. or (possibly) para. 2 of Part IV brings the trust for sale into being. This would seem to be so notwithstanding that the definition of " land " in section 205 (1) (ix) of the L. P. A. expressly excludes " an undivided share in land ". As to undivided shares in remainder created after 1925, section 34 (1) of the L. P. A. provides that : " An undivided share in land shall not be capable of being created except as provided by the S. L. A. 1925, or as hereinafter mentioned ". Section 34 (2) and (3) operate to create a trust for sale where, after the commencement of the Act, land is expressed to be conveyed to any persons in undivided shares or a devise, bequest or testamentary appointment of land to two or more persons in undivided shares comes into operation. Section 36 (4) of the S. L. A. provides that an undivided share in land shall not be capable of being created except under a trust instrument or under the L. P. A. 1925, and shall then only take effect behind a trust for sale. Notwithstanding that none of these provisions is expressly limited to undivided shares vested in possession, it would seem that they must be construed as being so limited, as otherwise the express creation of the statutory trusts by section 36 (1) of the S. L. A. when the interests fall into possession would be superfluous. If this reasoning is correct, the undivided shares, while interests in remainder, still retain their character as realty and are not converted into personalty so as to pass under a residuary bequest of personalty (see *Re Kempthorne*, [1930] 1 Ch. 268).

The cases of *Re Earl of Stamford and Warrington*, [1927] 2 Ch. 217, *Re Stevens' and Dunsby's Contract*, [1928] W. N. 187, and *Re Bird*, [1927] 1 Ch. 210, are authorities for the proposition that statutory trusts are not created under para. 1 of Part IV where the undivided shares are not vested in possession immediately before the coming into force of the Act, but that the land still remains settled land (see head D, § 1 (iii) above). For a discussion see 80 S. J. p. 67.

F. Party structures and open spaces

PARAGRAPH 3 OF PART IV OF THE FIRST SCHEDULE TO THE L. P. A.

Para. 3 is as follows:—

" This Part of this Schedule shall not save as hereinafter mentioned apply to party structures and open spaces within the meaning of the next succeeding Part of this Schedule ".

Party structures and open spaces are dealt with in Part V. They could not without qualification be made subject to a trust for sale.

(*To be continued in next issue.*)

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

Contract for sale—agent's commission.—In *Dennis Reed, Ltd.*, v. *Nicholls,* [1948] 2 All E. R. 914, a vendor agreed with the agents by instructing them to find " a person able, ready, and willing to purchase . . . at the price of £2,900 O. N. O. [or near offer] ". The plaintiffs found a person who made a firm offer of £2,800 and who could have paid that amount on completion. The vendor never accepted the firm offer because he got a better one. Lynskey, J., held that the agents were entitled to their commission. The learned Judge quoted some words of Collins, M.R., in *Chapman* v. *Winson,* 91 L. T. 19, cited by Scrutton, L.J., in *James* v. *Smith,* [1931] 2 K. B. (at p. 320) which emphasise that the event upon which commission becomes payable depends upon the precise terms of the contract and we need hardly point out that estate agents' contracts are very various. The case is of interest only as reinforcing the point that commission may become payable without any concluded contract and that it is not necessary to show that the purchaser has the purchase price in hand.

The first point was reinforced again in *E. H. Bennett and Partners* v. *Millett,* [1948] 2 All E. R. 929. This case turned upon the expression " a purchaser who is able and willing to complete the purchase ". Here a prospective purchaser was found who paid a deposit but owing to the inability of the vendor to find alternative accommodation the contract was never signed. Notwithstanding that " purchaser " normally means one who has completed a sale: *Luxor* v. *Cooper,* [1941] A. C. 108 (*ante,* Vol. 5, p. 294); Hilbery, J., came to the conclusion that the qualifying words " who is able and willing ", implied something less and that commission was payable: cf. *Giddys* v. *Horsfall,* [1947] 1 All E. R. 460 (*ante,* Vol. 11, p. 278). These continuous cases over contracts, commonly signed by persons of little experience of this, or perhaps any, kind of business, do point to a need for some practical steps to settle what the proper course with regard to commission should be. As matters stand it is inevitable that small variations in phrasing may be effective to change the liability and with inexperienced people this cannot be satisfactory.

Contract for sale—authority to make a particular contract—Hitherto it has appeared in the textbooks as law that putting property in the hands of agents to find a purchaser does not authorise the agent to sign a contract for sale: *Hamer* v. *Sharp* (1874), L. R. 19 Eq. 108; that definite instructions may give such authority to sign: *Rosenbaum* v. *Belson,* [1900] 2 Ch. 267; but that such contract is limited to an open contract: *Keen* v. *Mear,* [1920] 2 Ch. 574.

In *Wragg* v. *Lovett,* [1948] 2 All E. R. 968, the Court of Appeal (*per* Greene, M.R.) affirming Jenkins, J., have laid it down that this depends upon the character of the instructions and that instructions may extend to authorising the agents to get the best contract which they in their discretion think fit. On the other hand the Court was careful to safeguard itself and to point out that a simple authority to sell might not authorise the insertion of such terms as the agent thought fit, but this the Court did not have to decide.

Land Charges—estate contract—option to take a ten years' lease.—Sharp v. *Coates,* [1948] 1 All E. R. 871, is a reminder against too much "common sense" in the interpretation of the Property Legislation. A, a yearly tenant, holding as tenant from his mother, the freeholder, sub-let to B and in his contract of sub-letting agreed that if the reversion became vested in him he would grant a ten years' lease. The question was whether such agreement was an estate contract and required to be registered under the Land Charges Act, 1925. It was argued that though A had a legal estate in the land at the time of the contract and, therefore, in one sense could be described as "estate owner", nevertheless he could not grant the interest contracted to be granted out of his present estate and, consequently, the contract did not require registration. The Court of Appeal, affirming Humphreys, J., held that this agreement did constitute an "estate contract" and consequently required registration, so that a purchaser from A could give a valid notice to quit to B.

(1 K. & E., p. 344 n. (q), and p. 960 n. (e).)

Covenant to settle after-acquired property — effect as assignment — operation as forfeiture.—Re Haynes, [1948] L. J. R. 1745, emphasises the difficulties into which "after-acquired property" clauses may lead the beneficiaries. Here a residuary estate was left at the date of distribution absolutely to the beneficiaries provided that before that date the beneficiary had done nothing whereby the share had, *inter alia,* become vested in or payable to some other person. There was no reference to "any part" of the share. The beneficiary in his marriage settlement had covenanted to settle after-acquired property and the settlement was executed after the testator's death. Roxburgh, J., held that the covenant operated to make the property payable to some other person and operated as a forfeiture, holding himself bound by *Re Gillott's Sett.,* [1934] Ch. 97, where the promise was to pay over income within three days of its receipt to a person who had lent the transferor money. The cases are distinguishable in fact though not in law, because clearly this particular "assignment" was not "within the mischief" which the forfeiture clause was designed to prevent.

The learned Judge also held that the absence of the words "or any part thereof" did not prevent forfeiture from operating, because on construction this would follow having regard to *Re Dennis' Sett.,* [1942] Ch. 283 (*ante,* Vol. 6, p. 289) and distinguishing *Fraenkel* v. *Whitby,* [1948] Ch. 55 (*ante,* Vol. 12, p. 219) because in that case the point had not required decision and *Re Dennis' Sett., supra,* had not been cited to him.

The precedent for an after-acquired property covenant contained in Key and Elphinstone meets this point by excluding property subject to such conditions. This form should always be used, but there is no reason why the forfeiture clauses should not also be more discriminating as by the inclusion of such words as, "otherwise than under or by virtue of any conveyance or settlement made in consideration of marriage or by way of post-nuptial settlement".

(2 K. & E., p. 576 n. (o), p. 628 f. 19, p. 867 f. 12.)

"After-acquired property" clause—inclusion of reversionary interest—claim by volunteer for damages.—The first point decided in *Cannon* v. *Hartley,* [1948] 1 All E. R. 50, emphasises what we have said in our last

note. In this case Romer, J., held that a reversionary interest on the death of a life tenant created by a will coming into operation after a deed of settlement containing such a covenant was within the ambit of the covenant. This decision turned essentially upon construction and distinguished *Re Hughes' Sett.*, [1924] 2 Ch. 356.

Since the covenant had not been carried out the question was whether a party to the deed who was a volunteer, namely a daughter of the marriage, could sue for damages. This raised again the issue of the rights of volunteers under settlements where the property has not been brought into settlement. In *Re Kay's Sett.*, [1939] Ch. 329, it was held that the Court would not direct the trustees to bring an action on the covenant merely to benefit volunteers. Romer, J., held, distinguishing *Re Kay's Sett., supra,* and *Re Pryce,* [1917] 1 Ch. 234, that a party, who was a volunteer, could sue on the covenant at common law. The essential point being in this case that no equitable relief was claimed in the shape of specific performance. The distinction between this and the two earlier cases (which were elaborately considered in the judgment of Romer, J.) lies in the fact that the convenantee, who was a party to the deed, was also beneficially entitled and brought the action on the covenant directly.

Nevertheless, these decisions give rise to two difficulties. First, since 1925 " a person may take . . . the benefit of any . . . covenant or agreement over or respecting land or other property although he may not be named as a party . . .": Law of Property Act, 1925, s. 56 (1). It is not easy to see why this should not aid a number of beneficiaries who are not actually made parties; but cf. *White* v. *Bijou Mansions,* [1937] Ch. 610; [1938] 1 Ch. 351; *Re Sinclair's Life Policy,* [1938] 3 All E. R. 124.

Secondly, how can the decision in *Re Kay's Sett., supra,* be reconciled with the duty to preserve trust property? If there is an action on the covenant the claim on the covenant is a legal chose in action and surely it is then the duty of the trustee to reduce it into possession? It is not less the property of the settlement because it is a chose in action. In our opinion more will be heard of these cases.

(2 K. & E., p. 701.)

Easement of way—increase of burden by character of traffic—easement of water—duty to supply.—Kain v. *Norfolk,* [1949] 1 All E. R. 176, is an interesting decision upon the obligations placed upon a servient owner. In 1919 a grant of an easement of way was made " with or without horses, carts and agricultural machines and implements to go pass and repass over and along . . . ". Also a grant " to take water from and to water horses sheep and cattle at the pond delineated . . . but the vendor does not guarantee the supply of water ". It was argued that the right of way did not include " way " for three-ton lorries. With regard to the water the servient owner cleansed the pond, which had become silted up, but in doing so he made a breach in a retaining wall which allowed water to escape and did not immediately repair it. The learned Judge held as a fact that the cleansing was necessary. Jenkins, J., held that three-ton lorries were entitled to use the way and that this did not constitute an increase in the burden on the servient tenement, and that the retaining wall should have been repaired, because the dominant owner was entitled to the pond being in a condition to be a receptacle for any water that might flow into it.

On the first point the learned Judge did not go so far as to hold that the way was a way for all purposes, but merely that " carts " included in fact the method of carting by lorries (see p. 182).

On the second point the learned Judge said (at p. 183): "his (the servient owner's) obligation was limited, I think, to doing nothing to interfere with the supply of water in the way of active steps by him, as opposed to mere non-feasance, which would not involve him in any liability".

The first point undoubtedly presents difficulty to conveyancers. Although it is a well settled rule that the dominant owner cannot increase the *legal* burden upon the servient tenement, the modern cases clearly show that this does not prevent him from increasing the actual or physical burden: see *White* v. *Grand Hotel,* [1913] 1 Ch. 113; *S. E. R.* v. *Cooper,* [1924] 1 Ch. 211. In both these cases the character of the dominant tenement was changed, but it was held that a right of way for all purposes could be enjoyed in the new character, since the change did not affect the character of the legal burden. In this case the burden was increased by the character of the vehicles and the same principle was applied. It should be noted that this depends to some extent upon the character of the grant in each case. A grant could be construed as limited to the benefit of the dominant tenement in its then condition, *e.g.,* as an agricultural holding: see *Allan* v. *Gomme,* 11 A. & E. 759; or to the particular uses, as for example, by limiting it to foot traffic. The only peculiarity that has emerged in the instant case, and as forecast in *Lock* v. *Abercaster,* [1939] Ch. 861, is that the right will not at any rate necessarily be construed to exclude *methods* which could not be foreseen at the date of the grant. Methods will be construed liberally.

Nuisance—danger to highway—cricket balls—diseased trees.—In *Stone* v. *Bolton and Others,* [1949] 1 All E. R. 237, Oliver J., held that a passer-by on a highway, who was injured by a cricket ball, struck over the fence in the course of play, could not recover against the committee and members of the club either in negligence, because there was no sufficient evidence of carelessness, or in *Rylands* v. *Fletcher,* because the Judge ruled that it was not "non-natural" user, or in nuisance, because it was not a continuing state of affairs.

In *Caminer* v. *Northern and London Investment Trust, Ltd.,* [1948] 2 All E. R. 1101, Lord Goddard, L.C.J., held that a passer-by, who was struck by a falling elm tree due to disease, high wind and lack of topping, could recover either in negligence or nuisance from a lessor who "occupied" by his tenant the flats. It is by no means clear what the precise circumstances were, which made the defendants liable as "occupiers". It is also clear that the disease had taken a peculiar form and there was some conflict of evidence whether or not the trees ought to be topped and the question was one for experts. Nevertheless, the learned Lord Chief Justice held that property owners had obligations and one of them was to exercise reasonable care in the attention to elm trees.

Leaving aside the issue of negligence we suggest, with respect, that these two decisions are virtually irreconcilable except on the point that possibly a reasonable man would have foreseen the danger from the elms but not from the cricket. This point does not seem to agree with the evidence, because there were witnesses to the fact that the ball had been hit over the fence before, though there was no evidence that anyone had been hurt. The point taken by Oliver, J., that the ball coming over the fence was an isolated act, and therefore, could not be nuisance overlooks the fact that the trees falling, etc., are all isolated acts and have no more continuance. The nuisance, had there been one, would have been to play cricket in such proximity to the highway that persons *might* be hurt. This was the reasoning in *Castle* v. *St. Augustine's Links* (1922), 38 T. L. R. 615, which the learned Judge distinguished.

The only ground for distinguishing *Caminer* v. *Northern, etc., Trust, supra,* from *Cunliffe* v. *Bankes,* [1945] 1 All E. R. 459 (*ante,* Vol. 10, p. 52) would have been on the facts that the lessors could not reasonably have been expected to know of the danger. This ground was not acceptable on the facts.

Dangerous premises—liability between landlord and tenant—work done after the commencement of the tenancy.—Ball v. *London County Council,* [1948] 1 All E. R. 917, if it stands, may have some curious repercussions in the property world. The L. C. C. had gratuitously installed a new boiler to replace an old one. There was no safety valve and the fire being lit one cold day the boiler exploded. Stable, J., held that, as the work was done by the landlord *after the commencement of the tenancy,* the landlord could be liable in negligence and on the particular facts was liable in negligence. This involved distinguishing the cases of *Davis* v. *Foots,* [1940] 1 K. B. (not liable for escape of gas) and *Travers* v. *Gloucester Corporation,* [1947] K. B. 71 (noted *ante,* Vol. 11, p. 215) (defective geyser in bathroom) which appeared to draw a distinction between liability to a licensee and liability to a tenant, or a licensee of the tenant. The learned Judge here added to the distinction by drawing one between letting premises in a defective condition and subsequently bringing something defective onto the premises. It is, of course, vital to point out that the liability in *Ball* v. *L. C. C., supra,* did not depend upon the relationship of landlord and tenant, indeed conversely, it depended upon the fact that bringing the new boiler onto the premises arose after the contract of tenancy was complete. It would seem probable, therefore, that a licensee of the tenant, such as a wife or child, should be able to recover. The learned Judge deduced this result, as we understand him, from the observations of Greer, L.J., in *Bottomley* v. *Bannister,* [1932] 1 K. B., at p. 478 (a case of vendor and purchaser), where the learned Lord Justice distinguished the position from that of a vendor, if he had subsequently contracted to do work after he had completed the sale. With respect there seems to be a good deal of difference between the position of the vendor who ceases to have any interest in the land, and a lessor who retains the reversion. In our view there will be further developments in this problem.

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2. *CHARITIES*

Gift for "the benefit of the church and parish"—repair of the "bier house"—Re Norton, [1949] L. J. R. 53 is yet another of the cases on gifts for "parish work". In *Farley* v. *Westminster Bank,* [1939] A. C. 430, a gift to the church council to be applied to "parish work" was held to be not charitable. In *Re Norton* (*supra*), the gift was to the council for "the benefit of the church and parish". Jenkins, J., held that this was a good charitable bequest on the ground that though "parish work" could include non-charitable objects, a gift for the "benefit of the parish" operated as such and was charitable on the principle laid down in *Goodman* v. *Mayor of Saltash,* 7 App. Cas., at p. 642 by Lord Selborne, L.C.

It will be observed that in fact the learned Judge classified the bequest as operating as a twofold gift; namely, (a) for the benefit of the church, and (b) for the benefit of the parish. The first head would be a trust for the advancement of religion, and would follow the same line of argument as that of the same learned Judge in *Re Eastes,* [1948] Ch. 257

(noted *ante*, vol. 12, p. 297) where the gift was to the vicar and churchwardens "for any purposes in connection with the said church which they select": cf. *Re Simson*, [1946] Ch. 299. The second head is based upon locality, and as has been noted before (*ante*, vol. 11, p. 284, vol. 12, p. 141) the courts tend to permit the charitable character, where the objects are purely general: cf. *Re Smith*, [1932] 1 Ch. 153; *Re Baynes*, [1944] 2 All E. R. 597, but not where the objects are more particularly indicated and can be non-charitable: *Williams Trustees* v. *I. R. C.*, [1947] 1 All E. R. 513, *Re Strakosch*, [1947] 2 All E. R. 607.

In the case noted the testator narrowly missed upsetting his intentions by indicating two objects: (i) repair of his wife's parents' graves; and (ii) repair of the bier house. The first of these defects was regarded as a power to be disregarded as invalid: *Re Dalziel*, [1943] Ch. 277 (noted *ante*, vol. 8, p. 166). The second object the learned Judge held to be charitable and not less so because the bier house had been built without a faculty and consequently could be ordered to be removed.

(Tudor, 33.)

Trust for adult education—primarily political purpose—non-charitable.—Re Hopkinson, [1949] 1 All E. R. 346, is likely to prove an important case for the careful analysis by Vaisey, J., of the cases relating to political trusts in relation to charity. As was brought out in *National Anti-Vivisection Society* v. *I. R. C.*, [1947] L. J. R. 1112 (noted vol. 12, p. 63) "political purposes" can be a wide term including objects involving a change in the law. It therefore becomes important that trusts involving propaganda and which might otherwise be charitable must be carefully drawn.

In *Re Hopkinson* (*supra*), a fund was to be created to use both capital and income in the absolute discretion of the trustees "for the advancement of adult education with particular reference to the following purpose (but in no way limiting the general discretion in applying the fund for adult education)" and the purpose was to educate persons along the lines of the Labour Party's memorandum. The gift failed as a non-charitable object.

It should be noted that the gift was to apply capital and income in the discretion of the trustees. Hence there could be no question of "perpetuity", as it is understood in this type of gift, see *Re Tyler*, [1891] 3 Ch. 252; but presumably it was held void for want of any beneficiary capable of enforcing it. There are cases where the Courts have upheld gifts for which there was no beneficiary capable of enforcing them: *Re Dean*, 41 Ch. D. 552; *Re Hooper*, [1932] 1 Ch. 38, cf. *Re Chardon*, [1928] Ch. 464. There is, however, nothing in the report to show why his Lordship, having decided that it was not charitable, further decided that it must fail. This question of what is sometimes called unenforceable trusts is very difficult and this note does not attempt to deal with it. It may, however, be observed that most attempted charities which fail, do so because the gift fails for uncertainty if not charitable. This, indirectly, appears in the judgment of Vaisey, J. (at p. 350), where he remarks that "if the trust is one which the Court could not administer if the trustees disclaimed their duties thereunder, it would be a trust which could not be supported in law": referring to the judgment of Russell, J., in *Re Hummeltenberg*, [1923] 1 Ch. 237.

With regard to the essential issue, whether or not the trust was charitable, the question was dealt with by the learned Judge as a question of the intention of the testator. He held that notwithstanding the generality

of the direction the purpose was to secure " a certain line . . . of political administration and policy " and as such was non-charitable. He applied the *ratio decidendi* of Finlay, J., in *Bonar Law Memorial Trust* v. *I. R. C.*, 49 T. L. R. 221, that if the trust was for a political party the fact that lectures, etc., were educative would not make it a charity.

This, in fact, presents considerable difficulty in the creation of trusts brought into being by non-charitable societies, a practice which taxation has tended to increase. Because a charitable purpose benefits a non-charitable object it is not less a charity. This has clearly emerged in *Re Coxen,* [1948] Ch. 747 (noted *ante,* p. 131). But this is subject to the rule that the *dominant* purpose must be charitable. It would seem that a charitable trust can only be created by a non-charitable society which has some charitable objects and that those objects are the ones which alone are permitted to benefit. Even in such circumstances drawing the appropriate trust deed is difficult.

(Tudor, p. 41.)

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3. *WILL CASES*

By A. K. R. KIRALFY, LL.M., of Gray's Inn, Barrister-at-Law

Soldier's will—Wills Act, 1837, *s.* 11 *" actual military service "—effect of changed circumstances of warfare on conception of an " expedition "—new tests laid down by Court of Appeal.*—Denning, L.J., has often found occasion to round on some anachronism in the law. His judgment in *Re Wingham,* [1948] 2 All E. R. 908, should be welcomed in all quarters as a realistic solution of a problem which has not always received a treatment suited to modern conditions. In this case the testator was a member of the R.A.F. undergoing flight training in Canada. He executed an unattested will in March, 1943, and died in an air crash in the following August. Pilcher, J., decided, in the light of the existing authorities, that the airman had not been in any danger of hostile attack in Canada and was not in any theatre of war. Hence his will could not be upheld as an informal soldier's will. Denning, L.J., referred to the origin of the privilege of informal testation in a saving clause inserted in the Statute of Frauds, 1677, by Sir Leoline Jenkins. Jenkins had found this principle in Roman Law and in *Drummond* v. *Parish* (1843), 3 Curt 522, it was held that the principle must be interpreted in accordance with Roman rules. Denning, L.J., criticised the preservation of this idea. The words of the English Wills Act should be interpreted without reference to Roman rules on the same subject. Roman law had been developed at a period when war bore a completely different character. No one can tell how a Roman jurist would have decided the status of an airman training in a distant area and English law need not concern itself with his answer. The tests of actual danger to the testator and of deprivation of usual legal advice could not be justified. These were reasons for the introduction of the privilege but not the essentials of the privilege as it now exists. Bucknill, L.J., also pointed out that actual danger was not essential, as soldiers under orders to leave a safe area were already in actual military service (*Gattward* v. *Knee,* [1902] P. 99, *In the Estate of Gossage,* [1921] P. 194, *Re Kitchen* (1919), 35 T. L. R. 612) but considered that the testator in the instant case was in fact bereft of legal facilities. The deceased had been serving in a camp five miles from a small town in Saskatchewan and may have been unable to reach a civilian lawyer during business hours. Cohen, L.J., also stressed the military character of camp life, referring to the decisions

in *In the Estate of Spark,* [1941] P. 115, and *In the Estate of Rowson,* [1944] 2 All E. R. 36. Cohen, L.J., considered that all parts of the territory of a belligerent state would, in a modern total war, be within the range of the notion of an " expedition ".

The learned Lord Justices have suggested new tests of " actual military service ". Bucknill, L.J., suggested " service directly concerned with operations in a war which is or has been in progress or is imminent ". Denning, L.J., gives a very similar test. Once war is declared or is imminent all persons performing offensive or defensive functions or training for them are in " actual military service ", as are occupation troops performing occupation duties. It is thus immaterial that the testator serves part-time only, as in the Home Guard (disapproving *In the Estate of Anderson,* [1944] P. 1) or that he sleeps at home if he works in a military post as a member of the armed forces (disapproving *In the Estate of Gibson,* [1941] P. 118n). Cohen, L.J., also expressly disapproved of the latter case and neither is now law.

(Theobald 48.)

Wills Act, 1837, *s.* 21—*revocation of bequests by pasting over with paper—when original bequest still " apparent "—novel photographic procedure permissible.*—The Wills Act, 1837, s. 21 provides that unattested alterations of a will are void unless " the words or effect of the will before such alteration shall not be apparent ". The Courts have held that this means that such an alteration may effectively revoke the original bequests if they cannot be deciphered as a result of the alteration. In *Ffinch* v. *Combe,* [1894] P. 191, words were held apparent since a writing expert succeeded in reading them by holding the document against a windowpane. In *In the Goods of Brasier,* [1899] P. 36, words were held to be apparent where they could be deciphered with the aid of a magnifying glass. In *Re Itter, Dedman* v. *Godfrey,* [1948] 2 All E. R. 1052, Ormerod, J., has now held that infra-red photography may be used to read the original words. No previous application had ever been made for such a process to be used but the learned Judge held that " if the truth can be obtained by this method the fact that it has not been done before is no reason why it should not be done now or in the future ".

Ormerod, J., based his decision mainly, however, on the doctrine of dependent relative revocation. The testator obscured his original bequest under the mistaken impression that the substituted words on the strips of paper would be effective. As they are not effective, through lack of attestation, the intention to revoke is treated as wanting under the circumstances. This doctrine had already been applied to a case of pasting-over in *In bonis Horsford* (1874), L. R. 3 P. & D. 211, 44 L. J. P. & M. 9.

If the original words may not be " read " in any way then, where the doctrine of dependent relative revocation is not invoked, the Court will not remove the strips of paper. Hannen, P., pointed out in *In bonis Horsford, supra*: " I can see no reason why the Court should remove the paste and paper used as the instrument of obliteration rather than ink used for the same purpose." He explained, " It was the intention of the legislature in this respect, that if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose, that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament."

(Theobald 35.)

Rule against double portions—legacy and advance "ejusdem generis"—portion need not be purely gratuitous—effect of outside pressure on intention to provide for child.—Many cases on satisfaction and ademption are simply isolated and specialised applications of well-known rules. The decision of Jenkins, J., in *Re George's Will Trusts,* [1948] 2 All E. R. 1004, lays down at least one new rule and clarifies two others, and deserves closer attention. The so-called "rule against double portions" operates in this way. Where a testator makes substantial provision for a child by will and later makes a substantial *inter vivos* gift to the same child, equity presumes that the subsequent gift was meant in substitution for the original legacy, which is therefore *pro tanto* adeemed. In the present case a testator left two-thirds of his residuary estate to his son Ernest. After the execution of his will he entered into an arrangement in 1941, under pressure from the County War Agricultural Committee, under which he gave farm stock to Ernest and assigned certain leases to him. Jenkins, J., held that the general rule against double portions applied and that the son Ernest must bring into account the value of the farm stock when taking the bequest of residue under his father's will.

The learned Judge had, in order to reach this conclusion, to reject three strong lines of argument. In the first place it was urged that a gift of live and dead stock was too dissimilar in character to be set off against a bequest of residue. In *Re Jacques,* [1903] 1 Ch. 267, a conveyance of land had been held not to be an advance or portion, but in that case the basis of the decision was that "advances" were to be construed as advances of money and could not include grants of land. In the instant case this problem did not arise. That a gift of stock could constitute a portion had already been held in *Taylor* v. *Taylor* (1875), L. R. 20 Eq. 158, by Jessel, M.R., where stock-in-trade had been given. Since the testator in the present case was a farmer and his residuary estate consisted mainly of farm land the gift of farm stock was in fact similar in nature to the residuary gift. Again, as had already been held in *Taylor* v. *Taylor, supra,* objections as to dissimilarity between bequest and advance could not be made if a fixed valuation was set on the stock, and the farm stock had here been the subject of a valuation.

The second argument was that the gift of livestock could not be regarded as a true portion since it was part of a larger arrangement, under which certain obligations were imposed on the son, such as liability to pay rent under tenancy agreements. Jenkins, J., held that the gift of stock could, in effect, be severed from the tenancy arrangements. Since the tenancies were more than valuable enough to offset the liabilities which they entailed the gift of stock remained a pure bounty. The learned Judge refused to apply technical ideas of gratuitous gifts and nominal considerations, "I do not think the fact that a gift has an element of liability attached to it in itself prevents the gift from being a portion." This case follows the decision of North, J., in *Re Vickers,* 37 Ch.D. 525. In that case a testator had bequeathed the residue of his estate to his children in equal shares and later assigned his business to his eldest son, at the same time imposing on him an obligation to pay certain sums of money. North, J., held that the assignment could operate as a portion, to the extent that it in fact conferred benefits, and refused to hold that a bargain could not also confer a portion. He referred to the fact that a portion might be conferred on the marriage of a son, in which case the son in fact provides the "consideration of marriage".

Finally it was argued that a true intention to advance his son could not be attributed to the testator since his arrangement with his son was prompted by pressure from the agricultural committee. Jenkins, J., pointed out that this pressure had not influenced the selection of the son Ernest.

as donee, or the testator's underlying desire to provide for his child. This "anticipation" of the original plan must be distinguished from the case where an emergency loan is made to a child who is himself under pressure from creditors. In *Re Scott,* [1903] 1 Ch. 1 (C. A.), residue was bequeathed to a testator's children and later the testator advanced £5,000 to his son to repay an overdraft. The son was not required to bring this sum into account. The Court of Appeal held that payment of a child's debts was not necessarily an advancement (following *Taylor* v. *Taylor, supra*) but the special facts of the case narrow its applicability. All the testator's other children had had advances of £5,000 each, and his will expressly exonerated them from having to bring these into account. There was therefore good reason to exclude the rule against double portions on the basis of presumed intention.

(Theobald 546.)

Inheritance (Family Provision) Act, 1938, *s.* 2 (1)—*limitation of time for application for provision—no running of time until representation granted under will open to attack by applicant*—(overruling decision noted *supra,* p. 65).—In *Re Bidie,* [1948] 2 All E. R. 995, the Court of Appeal put right a situation which certainly would have defeated the objects of the 1938 Act. Where a man dies intestate and letters of administration are granted, his dependants are considered adequately protected by the enlightened modern law of intestate succession and the Court has no jurisdiction to modify this. Only where a will has been proved which works hardship can the Court grant relief against the provisions of the will. What is to happen if a man is thought to have died intestate, so that, say, his widow takes most of his estate, and later a will is discovered which leaves her penniless. The legislature would no doubt have wanted this remedied by the grant of maintenance. The administration "*ab intestato*" would have to be revoked and a grant of probate or administration "*cum testamento annexo*" made.

But section 2 (1) of the 1938 Act provides that an application for relief must be made within six months of the date on which representation is *first* taken out. Jenkins, J., felt that, in a case where a will is found after a grant on intestacy, no application could be made later than six months from the first grant. The section used the word "representation" without limiting it to cases of wills. The Court of Appeal reversed this decision and construed "representation" as limited by the context to representation upon which an application might be made under the 1938 Act, *i.e.,* testate representation. Lord Greene, M.R., explained (p. 999): "I cannot read those words as contemplating that the period of six months referred to would be, so to speak, a dead period during which no application could possibly be made." The section referred to "testator's estates" and this indicated what the legislature had in mind. And Lord Greene, M.R., stressed that this was a relieving statute meant to redress hardship and not perpetuate it.

What would happen if a will were proved which made adequate provision for dependants, but subsequently a later will was found which gave them a reason to apply to the Court for provision under the 1938 Act? Lord Greene, M.R., left this point open but Somervell and Evershed, L.JJ., felt that the same reasoning would apply and that they could only justify their decision if they indicated that they would in such a case treat the probate of the obnoxious later will as the "first representation" although such a decision would be more difficult to fit within the words of the statute (at pp. 1002–3).

(Theobald 77.)

Inheritance (Family Provision) Act, 1938—*Discovery—alternative available.*—Under section 1 (3) of the Act the amount of income available for application for the maintenance of a testator's dependants is determined by reference to the value of his "net estate". R. S. C. Order 54F, r. 9, confers very wide powers on the Court to require evidence of any matter it thinks fit. The Court of Appeal in *Re Borthwick,* [1948] Ch. 645, considered that this power impliedly excludes the usual remedy of discovery and that the applicant for provision may not seek to verify the value of the "net estate" by means of discovery.

(Theobald 74.)

Joint account at bank with benefit of survivorship upheld although in effect ambulatory until death and a circumvention of the Wills Act, 1837.—It is not uncommon for a person to desire to avoid the publicity of a will, and possibly proceedings to upset the will, by opening a joint account with the prospective legatee at a bank, in this way retaining control of the money but allowing it to vest in the legatee as the survivor of joint tenants on the benefactor's death. In *Young* v. *Sealey,* [1949] 1 All E. R. 92, such a procedure had been followed and it was held to constitute a good *inter vivos* gift. No point of estate duty was raised but simply whether this type of disposition was valid, in view of the Wills Act, 1837. Romer, J., found that it had been assumed in earlier cases that such a gift was valid, although the present objection had not been raised in those cases (*Re Harrison* (1920), 90 L. J. Ch. 186; *Marshal* v. *Crutwell* (1875), L. R. 20 Eq. 328). The learned Judge added that he should have inclined to decide the other way had there been no previous authority, but that any change in the law could only come from the Court of Appeal.

Republication of will by codicil a re-execution of will—exception where testator's intentions would be defeated.—In *Berkeley* v. *Berkeley,* [1946] A. C. 555, Lord Porter pointed out that the doctrine of republication will not be applied to defeat the testator's objects. In *Re Heath's Will Trusts,* [1949] 1 All E. R. 199, a testator made a will in 1932, confirmed it by codicil in 1937 and died in 1939. This will purported to impose a restraint on anticipation on a married woman. The Law Reform Act of 1935, s. 2 (1) preserved restraints imposed by will provided the will was executed before January 1, 1936, and the testator died before December 31, 1945. It was urged that the 1937 codicil made the will date from 1937 under the doctrine of republication, so that the restraint was void. Harman, J., held that the doctrine is inappropriate to such circumstances and the restraint was effectively imposed.

(Theobald 148.)

Perfection of imperfect "inter vivos" gift—sufficient if donor has done everything possible on his part.—It is a well-known doctrine of equity that an imperfect gift will not be completed (*Milroy* v. *Lord* (1862), 4 De G. F. & J. 264). In *Re Rose,* [1949] L. J. R. 208; [1948] 2 All E. R. 971, Mr. Rose executed a voluntary transfer, by way of gift, of shares in a private company, whose articles contained the usual clause giving the directors a discretion to refuse to register the assignee of shares as a member. In fact the directors delayed until Rose died but then registered

the donee. Jenkins, J., held that the donor had done everything in his power to transfer the shares and the gift was therefore good. "It is true (at p. 978) that Mr. Hook's legal title could not be perfected until the directors passed the transfer for registration, but that was not an act which the testator had to do, it was an act which depended on the discretion of the directors."

Construction—leaning towards general legacy—indications turn scales in favour of specific legacy—Re Rose, [1948] 2 All E. R. 971, should be read in conjunction with *Re O'Connor,* [1948] 2 All E. R. 270; 1948 Ch. 628, *supra,* p. 64.—As a general rule a legacy of the precise quantity of shares which a testator holds is treated as a general legacy. Some indications, other than this coincidence, may show that it is really specific. In *Re Rose,* Jenkins, J., found two circumstances sufficient, a reference by the testator to the possibility of his disposing of the shares before his death, which excluded the possibility that he meant the executors to buy the shares, and the fact that they were shares in private companies and therefore not procurable on the market.

(Theobald 114.)

Construction—"investments and securities".—In *Re Lilly's Will Trusts,* [1948] 2 All E. R. 906, the proceeds of a policy of life assurance were held not to pass as either an "investment" or a "security". Such a policy is not secured on property and is not what the testator was thought to have meant as an investment, although life assurance can be used as a form of investment. Harman, J., pointed out: "Those two phrases may mean almost anything, within limits, according to the context in which they appear."

(Theobald 154.)

Construction—gift on leaving issue surviving—must issue be "in esse" during life of person survived.—In *Elliott* v. *Joicey,* [1935] A. C. 209, a posthumous child was held not to have "survived" his father. Survival was held to imply living contemporaneously as well as outliving. In this case there was no direct gift to the posthumous child, only a gift to the father if the father left issue surviving. In fact the father died intestate and it would have been to the benefit of the posthumous child to have treated him as already "in esse" but this fact was felt by their Lordships to be fortuitous, and they stressed that no direct benefit to the surviving child was intended by the testator (see especially the judgment of Lord Macmillan at p. 240). In *Re Castle's Will Trusts,* [1949] Ch. 46, Jenkins, J., was able to distinguish *Elliott* v. *Joicey, supra,* in the special circumstances. A substitutionary gift was made to the issue of H. C. F., if H. C. F. died leaving issue who (a) survived the testator and (b) survived a certain event. H. C. F. had issue born after the testator died but before the other event had occurred. Although the survivals were cumulative and not alternative conditions, Jenkins, J., held that they were satisfied by surviving one of the alternatives in the technical sense and living after the other in the broader sense. "Where the requirement is to survive both the death of the testator and that of another named person, that requirement is met when a person is living at the date of the last of the events which has

happened." Whether the House of Lords would have approved this distinction is not clear, but it is important to notice that here the testator did intend in certain events to confer a direct benefit on the issue in question.

(Theobald 228.)

Construction—Meaning of " children "—evidence of surrounding circumstances admitted to include illegitimate children.—In *Re Wohlgemuth's Will Trusts,* [1949] Ch. 12, a testator made a will in 1936 leaving property to the children of himself and his wife. He and his wife already had two children born during his marriage to another woman and still illegitimate. The parties believed themselves incapable of having further issue and there was some medical support for this in the case of the husband, who had been injured. Jenkins, J., held that the two existing children benefited. The testator's opinion of his own incapacity was the vital matter. Had scientific evidence been necessary the learned Judge would have accepted it, however. An attempt was made, but without success, to introduce into the argument the rule developed in connection with the rule against perpetuities, where evidence of this kind has remained inadmissible since the days of Coke. In fact the Court limits this rule to questions of remoteness and often considers the possibility of further childbearing, when dealing with payment out of gifts or the termination of trusts.

(Theobald 220.)

Construction—division " per stirpes " and " per capita ".—In *Re Jeeves,* [1948] 2 All E. R. 961, is a short decision useful for a succinct statement of law by Vaisey, J. Residue was left " unto and equally between " the daughters of a brother and the child of a sister. Vaisey, J., referred to the undoubted " *prima facie* presumption that a division between persons of the same generation or standing in the same relationship to a testatrix ought to be a division *per capita* ". All these parties were nieces but Vaisey, J., thought that the testatrix in fact had the " households " of the brother and sister in mind. He therefore held that the sister's child took half and the brother's children shared the other half.

(Theobald 230.)

Construction—lapse of share of estate prevented by application of the rule in Hancock v. *Watson,* [1902] A. C. 14.—In the case of *Re Norton,* [1949] W. N. 23, a testator provided for the division of his estate equally among three daughters and engrafted trusts which failed to dispose of their shares on the death of each daughter, except on a contingency, the death of all three daughters without issue who attained a vested interest. The Court of Appeal held that one must await the happening of this contingency. If in fact this contingency did not occur then the remainder on the death of the first daughter would form part of that daughter's estate, since the share had first been given her, and the later trusts did not take it away from her. Accumulation of income, to go with the capital of the share, was ordered for twenty-one years, under L. P. A., 1925, ss. 175, and 164.

(Theobald 336.)

Construction—Contingency of surviving testator only—accruer clause on failure of issue—no contingency imported that accruer taken only by those who survive date of accruer. In *Re Walter's Will Trusts,* [1948] 2 All E. R. 955, the testator divided his estate among his surviving daughters. On failure of issue of married daughters there was a gift over to unmarried daughters. Two married and left no issue. The other six died unmarried and before their sisters. Jenkins, J., held that the spinsters' estates benefited by the accruer and they were not required to survive the married sisters. In the event the testator's sons then took the spinsters' shares under another gift over.

(Theobald 464.)

Construction—gift over limited to one event—court supplies the "casus omissus"—rule in Jones v. *Westcomb* (1711), Prec. Ch. 316.—A testator sometimes provides for a gift over of his residuary estate without expressly including all the circumstances on which he might mean it to operate. In order to avoid an intestacy the Court has jurisdiction, under the rule in *Jones* v. *Westcomb, supra,* to supply the further contingencies which the testator appears to have meant to bring the gift over into operation. Thus in *Davies* v. *Davies* (1882), 47 L. T. 40, residue was given to a sister if the testator's wife did not survive him by more than a year. The wife predeceased the testator. The Court held that the testator really meant the gift over to operate unless the wife survived him and outlived him for more than a year, and considered this an *a fortiori* case in favour of the sister. In *Re Fox's Estate,* [1937] 4 All E. R. 664, a gift over of residue was expressed to take effect if a legacy lapsed "through death". A legacy failed because the legatee died without issue, which was not quite the same. The Court of Appeal held that the gift over should take effect where the gift lapsed for any reason and not merely for death.

In the recent case of *Re Bowen,* [1948] 2 All E. R. 979, residue was left by a gift over to the testator's children in case his uncle died before the testator's mother, to whom the preceding life interest was given. In fact the uncle outlived the mother, but both predeceased the testator, an eventuality the testator had not anticipated. Wynn Parry, J., held that all the testator had in mind was that the children should take unless the uncle lived long enough to take the gift, and the gift over therefore took effect.

The rule in *Jones* v. *Westcomb, supra,* is based on presumed intention. As the learned Judge put it in *Re Bowen, supra* (at p. 982): "If the testator had been asked what was to happen to his residuary estate if the uncle was alive at the death of the mother but had died in the testator's lifetime, I think he would unhesitatingly have said, 'Then, of course, the children are to take.'".

(Theobald 456.)

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4. *FAMILY LAW CASES*

By R. H. Graveson, Ph.D., S.J.D., LL.M., of Gray's Inn, Barrister-at-Law

Desertion—decision as to the place of the matrimonial home—Dunn v. *Dunn,* [1948] 2 All E. R. 822.—Denning, L.J., has already won for himself a high reputation by the progressive and realistic reasoning which distinguishes his judgments. In this case he, with Bucknill, L.J.,

and Pilcher, J., constituted the Court of Appeal which had to consider whether a wife's refusal to live at various shore stations with her husband, who was in the Navy, constituted desertion without just cause, the ground on which the husband's petition for divorce had been founded. Two points of interest arose. In the first place, counsel's argument was rejected, that because a wife refuses to join her husband the onus of showing just cause for the refusal is thrown on her, an argument which, as Denning, L.J., pointed out, confuses the legal burden of proof imposed on the petitioner to support the ground of the petition as desertion without just cause, with a provisional burden of proof raised by the state of the evidence (see 61 L. Q. R. 379). Accordingly, the wife's failure to rebut the inference of desertion by showing just cause, while naturally weakening her case, did not in itself relieve the husband of the general duty of showing the absence of just cause.

The second point has great significance whenever any question of desertion arises involving disagreement between husband and wife as to where the matrimonial home shall be established. The general proposition, that the husband has the right to decide where the home shall be, has for so long been regarded as an unwritten rule of the common law that it is, perhaps, surprising to learn that it is not a proposition of law, but simply one of ordinary good sense based on the fact that the husband is usually the wage-earner and has to live near his work. In the opinion of Denning, L.J., *Mansey* v. *Mansey* (1940), 109 L. J. P. 83, should not be understood in a contrary sense. In the words of the learned Lord Justice (at p. 823), " The decision where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over the other ". If on this basis parties cannot live together, the one guilty of desertion is the one whose unreasonable conduct has produced the separation. On this general question it is hard to resist making reference to Lord Eldon's judgment in the House of Lords' decision in *Lashley* v. *Hog* (Rob. Sc. App. Cas. 4; 4 Paton 581) in describing a husband as the person to " whom the policy of the law has given the direction of the family as to the place of its residence ". And yet there remain those who deny that the law of England fails to reflect social and domestic changes!

(Latey, pp. 95, 96.)

Desertion—wilful neglect to maintain—choice of matrimonial home—McGowan v. *McGowan,* [1948] 2 All E. R. 1032.—A necessary corollary to that part of Lord Justice Denning's judgment, noted above, relating to choice of a matrimonial home was brought out by this decision of a Divisional Court (Hodson and Pilcher, JJ.) made shortly after *Dunn* v. *Dunn.* The husband had appealed from an order of Justices for maintenance of his wife who had left the matrimonial home in the house of the husband's parents and, without consulting her husband, had gone to live in a flat which she had succeeded in obtaining for herself and her husband. The Justices considered the husband's refusal to join his wife in the flat as unreasonable. In allowing the appeal, Hodson, J., pointed out that the husband had satisfied his common law duty to maintain his wife by providing her with a reasonable home and the wife " does not succeed in establishing that he has not provided her with a reasonable home by showing that, having left him unreasonably, she has, by her independent action, found accommodation somewhere else which he is unwilling to accept ".

The rule expressed by Denning, L.J., in *Dunn* v. *Dunn* (above) thus applies with equal force to either party.

Desertion—divorce—summary proceedings—res judicata—Winnan v. *Winnan,* [1948] 2 All E. R. 862.—In defence of a wife's allegations of wilful neglect to maintain, a husband had pleaded before Justices the wife's constructive desertion, but an order had nevertheless been made against him on the wife's complaint. Later, the husband petitioned for divorce on the ground of desertion, basing his petition on the same facts as those used in his defence before the Justices. From an order of Cassels, J., granting the husband a decree *nisi,* the wife appealed on the ground (*inter alia*) that the question of desertion had become *res judicata* and that the husband was estopped by the Justices' order from pleading the same facts again. Though somewhat similar points were dealt with in *James* v. *James,* [1948] 1 All E. R. 214, and *Kara* v. *Kara,* [1948] 2 All E. R. 16 (noted Vol. 13, p. 75), the specific point in this case was bare of authority, and in the words of Bucknill, L.J. (at p. 869), delivering the unanimous judgment of the Court of Appeal, " I do not find it easy to give any clear cut reason why the rule of *res judicata* should not apply here, but I am satisfied that those who first formulated the rule never intended it to apply in such a case as this ". The sound reason behind this refusal to allow the rule to operate in the Divorce Division in respect of matters determined only incidentally or by implication before Justices was that any other view would grievously impair the jurisdiction of the Divorce Court. Where so large a proportion of matrimonial disputes which start in petty sessional courts finally reach the Divorce Court, any decision such as the present one which helps to banish the menacing spectre of *res judicata* will be welcomed by solicitors.

(Latey, p. 357.)

Divorce—condonation—whether a spouse is both a competent and a compellable witness in issues involving adultery.—Tilley v. *Tilley,* [1948] 2 All E. R. 1113.—The Court of Appeal has here delivered an important judgment on two points, the compellability of a spouse in issues involving adultery, and whether corroboration is required of a wife's evidence of intercourse with her husband as constituting condonation of adultery to which she had previously confessed. On the first point the Court held that the effect of the Judicature Act, 1925, s. 198, was to render the wife a compellable witness in respect of evidence of intercourse with her husband after she had left him, having admitted adultery; for the issue involved the adultery on which the husband's petition was founded. Both Bucknill and Denning, L.JJ., traced the history of the construction which they enunciated in judgments which contribute notably to reconciling the apparent conflict between the principles

(a) that a competent witness is normally also compellable (*R.* v. *Lapworth* (1931), 100 L. J. K. B. 52), and

(b) that at common law neither husband nor wife was competent or compellable to testify against the other.

On the second point the Court asserted the presumption against condonation, which exists in like manner to those against connivance and collusion, *i.e.,* the facts must raise a *reasonable* suspicion of condonation in order to give rise to a presumption as to its existence. Denning, L.J., appeared particularly concerned to ensure that the law as to condonation

should in no way prejudice parties in their efforts to achieve a reconciliation. "If the parties have only met for a discussion of their affairs", he remarked (at p. 1123), "and have not spent the night together, there is no reason to suspect condonation." It is a principle which protects a husband against the charge of condonation through unsupported testimony of a single act of intercourse. But while the nature of such circumstances would normally require corroboration of the wife's evidence, it is "a proposition of good sense and not a rule of law" (*per* Denning, L.J., at p. 1124), and if a Judge is satisfied with the wife's uncorroborated evidence, he is entitled to act on it.

(Latey, pp. 125, 128.)

Judicial separation—cruelty—parties living in same house after presentation of wife's petition—whether condonation—Mackrell v. *Mackrell,* [1948] 2 All E. R. 858.—This decision of the Court of Appeal, like the one noted above, follows the principle of narrowing the field of condonation in favour of avoiding prejudice to opportunities for parties to become reconciled, and in realisation of conditions of contemporary social life with its major domestic problem of shortage of accommodation. After repeated acts of cruelty by the husband, the wife in November, 1946, filed a petition for judicial separation, but continued to live in the matrimonial home. Intercourse between the parties had ceased in 1941. The wife's petition was dismissed at first instance on the ground of condonation, but the Court of Appeal allowed her appeal. Bucknill, L.J., attached importance to the short period of three weeks between the last act of cruelty and the filing of the petition, while Denning, L.J., taking the analogy of the wife's right to an order from Justices on the ground of cruelty of her husband, notwithstanding the fact that she continues to live with him (Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (1)), because she may have nowhere else to go, held that the same principle applied to proceedings in the High Court. Such a situation almost inevitably raises the question of condonation. Denning, L.J.'s qualifications on the nature of reconciliation (at pp. 860, 861), the essential requirement of condonation, give added weight to his remarks in *Tilley* v. *Tilley* (above). In the present case he observed that reconciliation did not take place unless and until mutual trust and confidence had been restored, and "The fact that the parties continue to live in the same house or the fact that the guilty party is reinstated in his or her former position is, indeed, evidence from which reconciliation may be inferred, but it is by no means conclusive" (at p. 861). The emphasis on reinstatement in *Fearn* v. *Fearn,* [1948] L. J. R. 1043 (noted above, Vol. 12, p. 307, and Vol. 13, p. 73) in the light of the present decision appears somewhat exaggerated.

There seems to be considerable justification for discerning in recent decisions, particularly of the Court of Appeal, a conscious and deliberate policy in support of securing the conditions for reconciliation which, after all, is no more than the modern emphasis on the common law policy in favour of marriage.

(Latey, p. 127.)

Separation and maintenance order—whether estate of deceased husband is liable for arrears of maintenance—Re Bidie, [1948] 2 All E. R. 995.—The Court of Appeal has now affirmed the decision of Jenkins, J., noted

above (Vol. 13, p. 76) holding that arrears of maintenance were not recoverable against a deceased husband's estate. But the widow's cries on her other claim under the Inheritance (Family Provision) Act, 1938, noted above (Vol. 13, p. 65) were heard with much more sympathy than in the Court below.

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5. *INCOME TAX CASES*

By L. J. Stein, Barrister-at-Law

Surtax—settlement—interconnected companies incorporated outside the United Kingdom—Finance Act, 1938, *ss.* 38, 41 (4) (*a*) (*ii*); *Finance Act,* 1939, *s.* 13.—In *Scott-Ellis* v. *C. I. R.* (now reported under the name of *Lord Howard de Walden* v. *C. I. R.*) the unanimous judgment of the Court of Appeal in favour of the Crown (see *The Conveyancer,* December, 1947, at p. 151) has been unanimously reversed by the House of Lords, and the obscure point at issue has been finally decided in favour of the taxpayer (1948), 2 All E. R. 825. For the purposes of Part IV of the Finance Act, 1938 (which is directed against tax avoidance by means of settlements), income arising under a settlement includes any income of a privately controlled company which has been apportioned to the trustees of, or a beneficiary under, the settlement as a result of a direction under the company surtax legislation. Any income of a foreign company which could have been so apportioned, had the company been incorporated in the United Kingdom, is also to be included in income arising under the settlement. This is the effect of section 41 (4) (*a*) (ii) of the 1938 Act. In what manner and to what extent is the scope of these provisions enlarged by section 13 of the Finance Act, 1939, which requires that, where an apportionment of a company's income is mentioned in any enactment, this shall be taken to include, not only a direct apportionment, but an apportionment resulting from a sub-apportionment, or a series of sub-apportionments, under the chain-of-companies provisions of the Finance Act, 1927 ? This was the question which arose in *Scott-Ellis' Case,* above. Company A was the trustee of a settlement. It controlled company B, which, in turn, controlled company C. Both B and C were incorporated abroad. It was common ground that the income arising under the settlement included so much of the income of B as could have been apportioned to A, had B been incorporated in the United Kingdom. But did the income arising under the settlement include, further, so much of the income of C as could have been apportioned to B and sub-apportioned to A, had both B and C been incorporated in the United Kingdom? To this question the House of Lords, reversing the decision of the Court of Appeal, has replied in the negative. Income of C could not be sub-apportioned, *via* B, to A unless B was treated as a company incorporated in the United Kingdom; if not, there could be no sub-apportionment to the shareholders of B. Hence, it was indispensable to the conclusion reached by the Court of Appeal that not only C but also B should be assumed to be incorporated in the United Kingdom. That assumption, said the House of Lords, was one which the relevant legislation did not require or authorise to be made. The combined effect of the 1938 and 1939 Acts was that a foreign company was to be assumed to be incorporated in the United Kingdom for the purpose of ascertaining whether its own income was apportionable, either directly or by the machinery of sub-apportionment, to the trustee of, or a beneficiary under, the settlement. On the other hand, it was not the case that a foreign company was, by virtue of the 1939 Act, to be assumed to be incorporated in the United Kingdom for the quite distinct purpose of

ascertaining whether the income of another company could, through the medium of a sub-apportionment, be apportioned to a trustee or beneficiary. If between such trustee or beneficiary and the company whose income was in question there was interposed a company not incorporated in the United Kingdom, there was no room for any sub-apportionment to the trustee or beneficiary, and in this respect the 1939 Act left the position unaffected.

Income tax—tax free annuity—decision in Re Waring overruled by Berkeley v. *Berkeley—res judicata—Finance Act,* 1941, *s.* 25.—*Re Waring* [1942] Ch. 423, was concerned with the application of section 25 of the Finance Act, 1941, to a tax free annuity bequeathed by will. The will was executed in February, 1939. The testator died in August, 1940. It was held by the Court of Appeal that the "provision" must be taken to have been made when the will was executed, and, as this was before September 3, 1939, it followed that the annuity was reducible to twenty twenty-ninths of the stated amount. *Re Waring,* above, was subsequently overruled by *Berkeley* v. *Berkeley,* [1946] A. C. 565, where the House of Lords decided that, in the case of an annuity bequeathed by will, the "provision" was "made" when the will took effect at the death of the testator. In *Re Waring* (No. 2), [1948] 1 All E. R. 257, an annuitant who had been a party to the proceedings in *Re Waring,* above, sought to take advantage of the decision in *Berkeley* v. *Berkeley,* which showed that, on the true construction of the statute, his annuity was payable in full. It was held that on the principle of *res judicata,* he remained bound by the decision of the Court of Appeal, notwithstanding that it had turned out to be erroneous. A similar question arose, and was likewise decided, against the annuitant in *Re Koenigsberg,* [1948] T. R. 365. In that case the Court had in 1942 made an order clearly founded on the natural assumption that *Re Waring,* then recently decided, correctly prescribed the test for determining, in the case of a testamentary tax free annuity, when the "provision" was "made". This assumption had not been challenged at the hearing and there had been no argument on the point. Roxburgh, J., held, nevertheless, that the order remained binding upon the annuitant and that he was estopped from re-opening the matter. The learned Judge arrived at this view with some reluctance but saw no escape from the conclusion that the case was one of *res judicata* by implication, the assumption that *Re Waring* was good law, and that, accordingly, section 25 applied to the annuity, having clearly been fundamental to the decision.

Estate duty—objects certified to be of artistic interest—Finance Act, 1896, *s.* 20; *Finance Act,* 1930, *s.* 40.—Section 40 of the Finance Act, 1930 (which replaces section 20 of the Finance Act, 1896, as amended by the 1910 and 1921 Acts), is concerned with death duties on objects certified by the Treasury to be of national, scientific, historic or artistic interest. Where such objects pass on a death, they are exempt from death duties while enjoyed in kind, but in the event of any of them being sold, death duties become chargeable on the proceeds of sale in respect of the last death on which the object passed, the person by whom or for whose benefit it was sold being accountable for the duties. In *Re Oppenheimer,* [1948] T. R. 369, a testator had died leaving a valuable art collection. By his will he had bequeathed part of the collection to his widow, with an indication of his desire (but not so as to impose a binding obligation) that she should give certain pictures to X and Y respectively

as mementoes. X and Y duly received the gifts intended for them. X subsequently sold his picture. Of the pictures not included in the bequest to the widow, the testator had bequeathed some to X and one to Z. X subsequently sold one of the pictures bequeathed to him. All the pictures had been certified by the Treasury under section 40, above. The will directed that all specific bequests should be free from all duties in respect of the testator's death. On these facts, the first question which arose was whether the death duties for which X had become accountable on the sale of the picture given to him by the widow were recoverable by him from the testator's estate. Roxburgh, J., held that they were not so recoverable. The picture had been bequeathed to the widow as beneficial owner, and, though in presenting it to X she had carried out the testator's wishes, X could not be treated as a specific legatee under his will. The learned Judge was also asked to decide whether the direction that specific bequests should be free from all duties in respect of the testator's death covered duties payable in respect of the sale by X of the picture bequeathed to him. It was contended that section 40, above, had altered the law, in that the dutiable subject-matter was no longer the artistic object but was now the proceeds of sale, with the result (it was argued) that this was not a case of death duties on a specific bequest under the will. The learned Judge rejected this contention, holding that what was altered by the 1930 Act was not the subject-matter but merely the measure of liability; the death duties here in question were duties payable on a specific bequest in respect of the testator's death, and were, accordingly, recoverable from the testator's estate.

Estate duty—legacy duty—legacies free of death duties—treatment of "further legacy duty" under Finance Act, 1947, *s.* 49.—In *Re Shepherd,* [1948] 2 All E. R. 932, adds one more decision to the authorities on the construction of testamentary directions for the payment of legacies free of death duties. After making various specific and pecuniary bequests, a testator declared that "all the before-mentioned legacies and bequests, whether settled or otherwise, and all the said annuities whensoever payable, shall be paid free of all legacy and other death duties (if any) and that all such duties shall be paid out of my residuary estate". The legacies included a settled legacy of £20,000 to be set aside at once for the benefit of X for life and then for Y absolutely. The trustees were authorised for twenty years after the testator's death to pay out of income certain charitable subscriptions. They were empowered to appropriate a fund to answer the annuities. They were directed out of the residuary estate to "make provision for the payment of the annuities hereinbefore bequeathed and the duties on any legacies, annuities or bequests bequeathed free of duty". The questions which Harman, J., was asked to decide related to the estate duty and legacy duty exigible at the death of the tenant for life of the settled legacy of £20,000. As to estate duty, the learned Judge, after weighing, in the light of *Re Wedgwood,* [1921] 1 Ch. 601, the arguments in favour respectively of the wider and narrower views of the directions as to freedom from death duties, concluded that, in the absence of anything in the will pointing unmistakably to a contrary intention, the words "free of . . . death duties" must be taken to refer only to duties for which liability arose at or in consequence of the testator's death. They would not, therefore, cover estate duty for which liability would arise at the death of the life tenant of the settled legacy. Legacy duty, on the other hand, was on a different footing. Different

rates of duty being involved, the duty actually payable at the testator's death was limited to duty on the value of the life interest, the duty on the corpus remaining to be paid at the death of the life tenant. Nevertheless, the duty under both aspects was imposed with reference to the death of the testator. Hence, the learned Judge held that it must be borne by residue. He held, further, that this applied not only to the pre-1947 legacy duty, but also to the " further legacy duty " introduced by section 49 of the Finance Act, 1947, and payable, under subsection (3), in such a case as that under consideration, notwithstanding that the testator had died before the date mentioned in subsection (1), *viz.*, April 16, 1947. It was sought to argue that the freedom from death duties given by the will did not extend to this " further legacy duty ", since this (it was contended) was not a duty for which liability arose at the death of the testator. The learned Judge, however, brushed this contention aside, holding that the real effect of the 1947 Act was merely to raise the rate of the old legacy duty and that the two duties, which were really one, fell together upon residue.

Estate duty—trustees' power of advancement—hypothetical question of liability for duty on the happening of a future event—Finance Act, 1894, *s.* 8; *Administration of Justice Act,* 1933, *s.* 3; *Finance Act,* 1940, *s.* 43; *Crown Proceedings Act,* 1947, *ss.* 13, 23.—In *Re Barnato, Joel* v. *Sanges and Others,* [1948] 2 All E. R. 585, the plaintiffs were the trustees of a will whereby a fund was settled on trust for X for a protected life interest, with remainders over in favour of (among other persons) the issue of X. The will gave the trustees a power of advancement exercisable with the consent of X, who had asked that it be exercised in favour of her issue. The trustees raised by originating summons certain questions of construction and administration. These did not concern the Crown, but the summons also raised the question whether, if the power of advancement was exercised, the trustees would be accountable, under section 8 of the Finance Act, 1894, for any estate duty in respect of the sum advanced which might become exigible on the death of X under section 43 of the Finance Act, 1940. This being a question between the trustees and the Crown, the Commissioners of Inland Revenue were joined as defendants. It was held that they had been improperly joined and ought to be struck out. The procedure by way of originating summons under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, is available to a person against whom a claim has been made by the Crown for the payment of death duties, or who has reasonable grounds for apprehending that a claim may be made against him in respect of any death duties which have, or are alleged to have, become chargeable. In the case under consideration no such claim had, in fact, been made nor was there any question of the duties in question having become chargeable. What the Court was asked to determine was a hypothetical question which could not arise until the death of X. This, it was held by Harman, J., was clearly not a matter within the scope of section 3, above, nor was any assistance to be derived by the trustees from the Crown Proceedings Act, 1947, it being impossible for them to bring themselves on this point within the Rules of Court governing the procedure by way of originating summons.

6. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—deceased a statutory tenant by virtue of retrospective effect of section 1 (1) *of the Rent Restrictions (Notices of Increase) Act,* 1923.—It is quite clear, since the decisions in *Smith* v. *Mather,* [1948] 2 K. B. 212, and *Thynne* v. *Salmon,* [1948] 1 K. B. 482, that section 12 (1) (*g*) of the 1920 Act only applies where the deceased was at the time of his death a statutory and not a contractual tenant. In *Phillips* v. *Welton,* [1948] 2 All E. R. 845, the deceased died in 1922 and was actually a contractual tenant at the time of his death. Notices of intention to increase rent had, however, been served on him in 1920. By virtue of section 1 (1) of the Rent Restrictions (Notices of Increase) Act, 1923, such notices have effect as notices to determine the tenancy. Since this subsection is retrospective in its operation it had the effect of transforming the deceased's contractual tenancy by legislative magic into a statutory tenancy, notwithstanding that it was passed after his death. His widow, therefore, became entitled to the protection of section 12 (1) (*g*) and, as the benefit of this protection is exhausted after one transmission, his daughters, the defendants in a claim for possession by the landlord, had no claim to remain in possession.

(Rent Restrictions Guide, 2nd ed., pp. 41–43, 66.)

Rent Restrictions Acts—value of attendance to the tenant means to original tenant, not assignee—value separately fixed in tenancy agreement taken as a genuine pre-estimate.—In *Artillery Mansions* v. *Macartney,* [1948] 2 All E. R. 875, the Court of Appeal further elucidated the meaning of section 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. The lessons to be derived from the judgments of Tucker and Asquith, L.JJ., are these:—(1) In determining whether the amount of rent which is fairly attributable to attendance, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent, it is the value to the original tenant with whom the contract is made, not an assignee, which is to be taken into account; (2) it is the value to the original tenant as an individual, taking into account his particular requirements as allowed for in the contract which is to be regarded, not the value to an assumed average or normal tenant of the flat in question; (3) in entering into an agreement the parties may very well take into account the extent to which the particular tenant in question is likely to use the services provided by the landlord and pre-estimate their value accordingly; (4) but a mere failure by the tenant to make use of services the value of which had been taken into account in the contract will not affect the matter; (5) where the contract puts a figure on the services there is a strong presumption that the contractual value is a true expression of the value to the tenant.

In *Macartney's Case* the tenancy agreement fixed £15 as the payment for attendance. The total rent, including this sum, was £185, and it was admitted by the landlords that £15 was not a substantial portion of £185. The landlords, however, sought to argue that the value of the attendance should be taken as the value to the present tenant, who was an assignee, not to the original tenant who had made the agreement. The Court rejected this argument and held that the £15 represented a genuine pre-estimate by the parties of the value of the attendance to the original contractual tenant.

These propositions were to a large extent implicit in the judgments in

the House of Lords in *Palser* v. *Grinling*, [1948] A. C. 291. The distinction between mere non-user of available services and an estimate made at the time of the contract of the probable extent of user by the particular tenant is well brought out by Tucker, L.J., in an analysis of the judgments of Morton, L.J., and Lord Simon in *Palser* v. *Grinling*.

(Rent Restrictions Guide, 2nd ed., pp. 72–75.)

Rent Restrictions Acts—Housing Act, 1936—*local authority's power to terminate a tenancy in the exercise of their powers of management—Small Tenements Recovery Act*, 1838.—The cases of *Shelley* v. *L. C. C.*, and *Harcourt* v. *L. C. C.*, [1948] 2 All E. R. 898, arose out of proceedings under the Small Tenements Recovery Act, 1838, but the point of substance decided was that the termination of tenancies of houses provided for the working classes was incidental to the powers of management, control and regulation conferred on a local authority by section 83 (1) of the Housing Act, 1936, and that, therefore, the tenants were not protected by the Rent Restrictions Acts. Section 156 (1) of the Housing Act, 1936, excludes the application of the Rent Restrictions Acts where a local authority require possession to enable them to exercise their powers under any enactment relating to the housing of the working classes. The House of Lords accordingly held, Lord du Parcq dissenting, that the tenants in these cases were not protected against a claim for recovery of possession.

The Small Tenements Recovery Act, 1838, applied to these two cases, notwithstanding that the rents paid exceeded £20 a year, as a result of the express extension of jurisdiction contained in section 156 (2) of the Housing Act, 1936. Two subsidiary points decided were that the Justices cannot decline to exercise jurisdiction under the 1838 Act on the ground of hardship to the tenant; they can only decline where, for good reason, they are satisfied that the case ought not to be heard under the Act at all. The second point was that the Justices can only postpone execution of the warrant under the 1838 Act for a maximum period of thirty days after its issue.

(Woodfall, 24th ed., pp. 351, 1116–1119.)

Rent Restrictions Acts—meaning of "rent"—agreement in contemporaneous document to pay annual sums for decorative alterations and cost of management.—The Court of Appeal in *Alliance Property, Ltd.* v. *Shaffer*, [1949] 1 All E. R. 312, carried the principle of *Property Holding Co.* v. *Clark*, [1948] 1 K. B. 630, discussed in these notes in March, 1948 (p. 238), a step further. In *Clark's Case* the expression "rent" was held to cover a separate sum for services mentioned in the same instrument as the ordinary rent. In *Shaffer's Case* it was held to include sums agreed to be paid by a separate but contemporaneous document in respect of decorative and other work carried out by the landlords and the cost of management. In *Clark's Case* the proviso for re-entry applied on non-payment of the additional payment for services, and this point was emphasised by Scott, L.J. In *Shaffer's Case* the proviso for re-entry in the lease did not apply on non-payment of the additional amounts mentioned in the contemporaneous deed, but the Court held that this was not material. The combined payments represented the monetary consideration for the grant, and the Court, looking at the matter "on a realistic and fair basis" held that they together constituted "rent" and determined the standard rent.

It is, as Denning, L.J., pointed out, common knowledge that the landlords of flats often divide the total payment into two parts, one part to represent the value of the physical hereditament, the other part to represent the value of the services. The reason is that for rating purposes the value of the flat is fixed without taking the services into account: *Bell Property Trust, Ltd.* v. *Hampstead Borough Assessment Committee,* [1940] 2 K. B. 543.

(Rent Restrictions Guide, 2nd ed., pp. 32–33.)

Rent Restrictions Acts—statutory tenant with more than one home—occupation by former wife—personal occupation.—Although personal occupation is of the essence of a statutory tenancy (*Skinner* v. *Geary,* [1931] 2 K. B. 546), this does not mean that a statutory tenant must reside continuously or exclusively in the dwelling-house of which he is the statutory tenant. In *Langford Property Co., Ltd.* v. *Tureman,* [1948] W. N. 379, a statutory tenant of a flat slept there on the average two nights a week and rarely had a meal in the flat. He and his family had a cottage in the country in which they resided. The Court of Appeal held that a man might have more than one home and that, despite the fact that the statutory tenant paid only fleeting visits to the flat, there was sufficient personal occupation to maintain his statutory rights under the Rent Restrictions Acts.

In *Robson* v. *Headland* (1948), 64 T. L. R. 596, a statutory tenant had left a flat and had no intention of returning. His former wife, from whom he had been divorced, and a child of the marriage of whom the wife had custody, continued to reside in the flat. The Court of Appeal held that the occupation of the flat by the former wife and the child did not constitute an occupation sufficient to keep the statutory tenancy alive. The Court distinguished *Brown* v. *Draper,* [1944] K. B. 309, where the facts were somewhat similar, but divorce proceedings were pending and not concluded, and explained it on the ground that the husband there was not a party to the action and it would not, therefore, have been proper to decide whether there were grounds for an order for possession against him. The Court reserved the question whether the position would have been different in the present case if there had been no divorce.

(Rent Restrictions Guide, 2nd ed., p. 66.)

Rent Restrictions Acts—standard rent—need not be full economic rent.—There is no proposition of law that the rent which determines the standard rent must be a true economic rent. The statement made by Scott, L.J., in *Roberts* v. *Jones,* [1947] K. B. 221, 224, that "If the Rent Restrictions Acts refer only to the rent of a dwelling-house which at the time of the rent being first paid was a free house, so that the rent would *prima facie* afford a fair market criterion of the rental value of the house, then the Court can have no regard at all to the time when the rent was 7s. 6d., for the house was not then free and its rent cannot be the standard" is not authority for any such proposition. As the Court of Appeal pointed out in *Insall* v. *Nottingham Corporation* (1948), 64 T. L. R. 617, Scott, L.J., was dealing in *Roberts* v. *Jones* with a rent imposed under a statutory provision, namely, the Housing (Rural Workers) Act, 1926.

The rent must, however, be a real rent and not a sham. Further, if the rent is less than two-thirds of the rateable value the tenancy is not subject to the Rent Restrictions Acts.

The decision in *Insall* v. *Nottingham Corporation* is in accordance with the earlier authorities, *Davis* v. *Warwick*, [1943] K. B. 329, and *Chamberlain* v. *Farr* (1942), 112 L. J. K. B. 206.

(Rent Restrictions Guide, 2nd ed., p. 46.)

Rent Restrictions Acts—apportionment of rateable value—undivided holding of house and lodge—necessity of apportionment.—In *Amphlett* v. *Dorrell* (1949), 65 T. L. R. 1, the tenant of a house and lodge let as an undivided holding at an entire rent claimed to have the rateable value apportioned as between the house and the lodge under section 12 (3) of the 1920 Act. The rateable value of the whole property, which had always been assessed as a whole, was outside the Rent Acts limits. The Court of Appeal held, applying *Rider* v. *Rollitt* (1920), 30 T. L. R. 687, that there was no jurisdiction to apportion. It was not "necessary" within the meaning of section 12 (3), since as between the landlord and tenant the rent and rateable value were already fixed. Even if an apportionment were made the rent and rateable value of the whole property, which would remain the relevant unit, would continue to be the sum of the two apportioned figures, so that neither portion of the property would be brought within the Acts. It may be observed that no question arose in this case between the tenant and a sub-tenant of the lodge; other considerations might apply to such a question.

(Rent Restrictions Guide, 2nd ed., p. 19.)

Tenancy—assignment—consent not to be unreasonably withheld—"tail-end of tenancy"—landlord wishing to prevent creation of statutory tenancy.—*Swanson* v. *Forton*, [1949] 1 All E. R. 135, is an important decision which applies *Lee* v. *K. Carter, Ltd.*, [1948] 2 All E. R. 690, discussed in these notes in December, 1948 (p. 149). In *Swanson* v. *Forton* there was a covenant not to assign without the landlord's previous consent, such consent not to be unreasonably withheld, etc. The tenant was not himself residing in the house and had no intention of so residing. There was a sub-tenancy which it is not material for the present purpose to describe. At a time when the tenancy had only twelve days left to run the tenant assigned it without having obtained the landlord's consent, although an application had been made for it. The assignment was made for the sole purpose of enabling the assignee to claim the protection of the Rent Acts as a statutory tenant when the contractual tenancy came to an end. Roxburgh, J., following the dictum of Evershed, J., in *Re Swanson's Agreement*, [1946] 2 All E. R. 631, held that the landlord's withholding of consent was unreasonable. The Court of Appeal (including Evershed, L.J.) reversed this decision and expressed disagreement with the dicta of Evershed, J., in *Re Swanson's Agreement*. The actual decision in *Re Swanson's Agreement* was distinguished on the ground that there the contractual tenancy had come to an end, so that no assignment was possible. The offending dicta of Evershed, J., consisted of putting a gloss upon the judgment of Tomlin, J., in *Re Gibbs* v. *Houlder Bros. & Co., Ltd.'s Lease*, [1925] 1 Ch. 209. Tomlin, J., had said that the only circumstances relevant to consider on the question of reasonableness were matters affecting "the personality of the lessee or the nature of the user or occupation of the premises". Evershed, J.'s gloss was to say that "by 'user or occupation' is meant the manner in which the premises are used or occupied—for example, for purposes which might cause offence even although they did

not involve any breach of covenant". Evershed, L.J., has now recanted and repudiated this doctrine of Evershed, J.

Nevertheless, the decision in *Swanson* v. *Forton* must be handled carefully and it would be wrong to regard it as affirming that it is in general reasonable for a landlord to refuse consent to an assignment of premises within the Rent Acts because the assignee would in due course become a statutory tenant. The circumstances in this case were wholly exceptional. The assignment was of the "fag-end" of the tenancy, the tenant was not himself in occupation and did not intend to occupy, and consequently in the absence of an assignment no statutory tenancy would have arisen. Thus regarded the case was similar to *Lee* v. *K. Carter, Ltd.*, where, because the assignor was a limited company and the proposed assignee a private individual, no statutory tenancy could have arisen without an assignment.

(Woodfall, 24th ed., p. 581.)

Landlord's title—basis of doctrine that a tenant cannot question his landlord's title.—In *Lewis & Sons, Ltd.* v. *Morelli*, [1948] 2 All E. R. 1021, there are some interesting dicta by Harman, J., on the doctrine that a tenant may not question his landlord's title. This doctrine is sometimes said to rest on estoppel, but an essential feature of an ordinary estoppel *in pais* may be lacking, namely, reliance on the truth of the representation made. The tenant's belief in his landlord's title is not essential. The doctrine is a special doctrine developed by analogy from leases by specialty to written and even oral tenancies, and is peculiar to the relationship of landlord and tenant. The converse of the doctrine also exists, namely, that a landlord, having by his offer of a tenancy induced a tenant to enter into (or remain in) occupation and to pay rent, cannot deny the validity of the tenancy by alleging his own want of title.

(Woodfall, 24th ed., pp. 13–17.)

Gratuitous installation of a dangerous boiler by landlord—liability in tort to tenant's daughter.—It is well settled by such cases as *Bottomley* v. *Bannister*, [1932] 1 K. B. 458, and *Davis* v. *Foots*, [1940] 1 K. B. 116, that a landlord is not liable to his tenant, in the absence of any express or statutory duty, for defects in the premises demised rendering them dangerous or unfit for occupation, nor is he liable for personal injury to the tenant or to members of the tenant's household caused by such defects, though he may have constructed them himself or may be aware of their existence. *Ball* v. *L. C. C.*, [1948] 2 All E. R. 917, shows, however, that if a landlord during the tenancy gratuitously installs a dangerous piece of equipment, such as a boiler without a safety-valve, he may be liable for injury caused, not only to the tenant but to the tenant's daughter or to other persons who in the normal course would use it. This duty has nothing to do with the relationship of landlord and tenant. It depends on the law of tort, not the law of contract, but it is of some interest to those who have to advise landlords of their legal responsibilities.

(Woodfall, 24th ed., p. 714.)

Agricultural holding—notice to quit—Defence Regulation 62 (4A)—*sale by tenants in common of their interests.*—*Edwards* v. *Hall*, [1949]

1 All E. R. 352, decided an interesting point affecting agricultural holdings, namely, that the sale to one tenant in common of the interests of other tenants in common of a farm was not a sale of the farm itself which required the consent of the Minister of Agriculture under Defence Regulation 62 (4A) to be given to a subsequent notice to quit. Undivided shares in land are personalty (*Re Price,* [1928] Ch. 579), but, even apart from this technical point, Lord Goddard, C.J., would have been prepared to hold that the Defence Regulation did not apply.

This is clearly good sense. Defence Regulation 62 (4A) has been revoked so far as England and Wales are concerned since March 1, 1948, so that the decision is of less practical importance for the future. Section 30 of the Agricultural Holdings Act, 1948, however, deals with the effect of a contract for the sale "of the landlord's interest in the land or any part thereof" during the currency of a notice to quit. If all the tenants in common together constitute the landlord, the sale of the interests of some of them to one of them would not be the sale of "the landlord's interest" even if the subject of the sale were interests in the land. The decision is, therefore, of some assistance in relation to section 30, although the section is differently worded from the Defence Regulation.

(Woodfall, 24th ed., p. 983, and Supplement No. 5, p. 116.)

Liability of landlord at common law for damage by game—reservation of sporting rights.—In *Seligman* v. *Docker,* [1948] 2 All E. R. 887, a tenant claimed damages from his landlord, who had reserved the sporting rights, for injury caused to his crops by game. It was proved that in the autumn of 1947 there was an abnormal increase in the number of pheasants in the landlord's coverts, due entirely to the very exceptional weather conditions in that year, and not to any increase in the breeding stock left on the landlord's shoot at the beginning of the season. It was held by Romer, J., that the landlord was not liable. Romer, J., accepted as the principle of liability the following dictum of Scrutton, L.J., in *Peech* v. *Best,* [1931] 1 K. B. 1, 14:—

> "In *Farrer* v. *Nelson* a sporting tenant who brought an unreasonable number of pheasants on the land which injured the crops was held liable in damages. This apparently shows that both landlord and sporting tenant must use their land reasonably having regard to the interest of the other, and will be liable for damage caused to the other by extraordinary, non-natural, or unreasonable action."

On the facts he held that the landlord had not been guilty of any unreasonable conduct. The presence of an abnormal number of pheasants on his land was not due to any unreasonable action on his part, but to unprecedented weather conditions. Further, since the birds were *feræ naturæ* the landlord was under no legal obligation to reduce them.

It appears that proceedings under section 11 of the Agricultural Holdings Act, 1923 (now reproduced in section 14 of the Agricultural Holdings Act, 1948) had been commenced but were suspended. This section is subject to certain restrictive conditions which the tenant possibly found it difficult to fulfil. Also, he may have hoped to obtain a larger sum by way of damages than he could have obtained under that section.

(Woodfall, 24th ed., p. 808.)

THE LIBRARY

Emmet's Notes on Perusing Titles. Thirteenth edition in two volumes. By J. Gilchrist Smith, LL.M., Solicitor. London: The Solicitors' Law Stationery Society, Ltd. (Volume I, £3.)

This work which constitutes the first of two volumes deserves a warm welcome. The present reviewer confesses to a tendency to resort to *Williams on Vendor and Purchaser* rather than to Emmet; but as no edition of that work has appeared since the war the new Emmet has the definite advantage of being up to date. A fairly wide test of the new edition shows it to be very reliable and comprehensive so far as concerns the sections dealt with in Volume I. It may be said at once that this volume covers the main field of investigation of Title, and that nearly all of the points which this reviewer selected in order to test the work were found to be dealt with in this volume. The second volume will deal mainly with leases, mortgages, risks, powers of personal representatives and trustees and with registered land. So far as it was possible to judge, there are very few misprints and these are of a very minor nature, such as "doctine" for "doctrine" (p. 434) and "barried" for "barred" (Table of Contents, p. xv). At p. 264 "March, 1945, p. 141" should read "March, 1945, p. 130 and June, 1945, p. 191"). At p. 137 (line 23) the words "express or" should precede the word "implied". The editor of this edition has effected a considerable re-arrangement of the work; but the general lay-out is still a little unusual. It seems curious, for example, to find the Transitional Provisions dealt with under a chapter on Parties. However, the indexing has been well done, and this obviates any difficulty which might otherwise arise from the unusual situations in which particular subjects are to be found.

The material is reliable and it is clear that the new edition has spared no pains to incorporate up-to-date information and views concerning matters which are of topical interest, such as the great effect of the Town and Country Planning Act, 1947, and the effect of the somewhat unpopular decision in *Re Cook* which has raised the question: "Does a trust for sale exist longer in favour of a purchaser than it does in favour of the beneficiaries?"

This reviewer has nothing but praise for this new edition, for the full manner in which the edition has dealt with the more frequent problems which arise in conveyancing as well as those which crop up in connection with investigation of title or disputes arising out of contracts. He ventures to add that perhaps in connection with the next edition the following suggestions might be considered:—

(1) Possession pending completion. Possibly a good deal more might be said on this point.

(2) Compensation after completion. Some passages from the judgments in *Behn* v. *Burness* (1863), 32 L. J. Q. B. at p. 206, and *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, might usefully be incorporated (as to warranties).

(3) Possibly the section dealing with payment of interest is too brief (p. 217); and the material did not seem to be as lucid as the majority of the work.

(4) The incorporation of Law Society Conditions (in some cases with little comment) may perhaps tend to unbalance the work.

(5) As to enfranchised copyholds. The very useful material to be found at p. 277 of the *Law Society's Gazette* for December, 1935 (concerning compensation for manorial incidents), and in the same Gazette for March, 1936 (as to stamp duty), reproducing a circular issued by the Ministry of Agriculture and an opinion of the Inland Revenue concerning these matters, might well find a place in the next edition. And to those matters there might be added the purport of s. 3 of the Postponement of Enactments (Miscellaneous Provisions) Act, 1939, and of s. 129 of the Law of Property Act, 1922, which may have the effect of avoiding certain conveyances made before December 31, 1935.

If the forthcoming second volume of this work maintains the high standard of the first volume the editor will have produced a work which will lighten very considerably the task of all who engage in conveyancing work, whether as counsel, solicitor or managing clerk. It is a thoroughly practical work and has already saved this reviewer considerable time, particularly in relation to recent decisions and statutes.

E. O. Walford.

Lectures on the Town and Country Planning Act, 1947. By R. E. MEGARRY. 1949. Stevens & Sons, Ltd. (9s. 6d. net.)

Two features have emerged in connection with the new Town and Country Planning Act since it was passed in August, 1947. The first is that the Act affects far more people than the people suppose, and the second is that those of the people who do appreciate the impact of its arrival (not by any means in utter nakedness but trailing clouds of regulations) frequently fail to realise how deeply it can, and sooner or later undoubtedly will, affect their lives and property. Accordingly, among the ranks of those who now seek (or ought to be seeking) knowledge and understanding of the Act should be not only the lawyers, surveyors, valuers and other experts but also the proprietors of commercial undertakings, land-owners, builders, developers of kinds and, indeed, one need not hesitate to add Messrs. Tom, Dick, Harry, Thomas Cobley and all.

For the average reader in such a motley crew the trouble with law books is that they are either too long or too short.

A little learning is a dangerous thing
Drink deep or taste not the Pierian Spring.

These poetic injunctions are all very well in their way but the 1947 Act is heady stuff and whilst merely sipping it may lead to misleading and inadequate conclusions, quaffing it in draughts is likely to break all but the stoutest hearts. Yet all must taste the Act (there is no escaping this for planning is now comprehensive and ubiquitous) even though the experts alone need to "drink deep".

When one comes to *Lectures on the Town and Country Planning Act, 1947* there is found a law book which is neither too long nor too short but just about just right —one in fact which (always assuming that incisive study of an Act of Parliament is capable of promoting happiness at all) is calculated to bring the greatest happiness to the greatest number of the motley crew previously mentioned. In the writing of any law book it is never an easy thing for the author to steer his pen between the Scylla of Too Much and the Charybdis of Too Little, but in the present work Helmsman Megarry achieves this feat with success. The result is a book of not more than 109 pages covering the essentials of the Act and illuminating its dark places with saws, modern instances and practical examples which are frequently graphic and always to the point. The Act is genuinely discussed and not merely paraphrased and thus is provided service for both the expert and the inexpert reader.

The book is founded on lectures originally produced in London by the author and later, after a successful season at the Law Society's Hall, taken on tour where they played to provincial Law Societies in places as widely dispersed as (to quote the publishers) Truro and Ipswich, Bournemouth and Carlisle. The personal conversational style of the lectures has found its way into the book and the book is the better for it.

There is added in the Appendix a useful list of official publications relating to Town and Country Planning to which those whose appetite is whetted by this book (and they will be many) can have recourse for further (but not necessarily better) particulars of the Act. In addition the book contains a highly informative planning calendar from which the land-owner can discover almost at a glance under how many distinct and different heads time under this Act is now running against him. This is a calendar which should be watched with care.

DESMOND HEAP.

Inner Temple Papers. By SIR FRANK DOUGLAS MACKINNON, a Master of the Bench of that Honourable Society. London: Stevens & Sons, Ltd. 1948. 236 pp. (21s.)

This volume can only be described as a charming "miscellany" of what we believe might in literary circles be described as "fugitive pieces". Most of them are "historical" in that they deal with old things, but they are the intimate by-ways and deal much in past personalities. Of course the "centre piece" is the annotated edition of Charles Lamb's essay on "the Old Benchers" which alone would make the book. These papers constitute the form of "recreational reading" that still has the tang of professional interest. As such they have an interest far outside the members of "that Honourable Society" and we commend them to all our Readers.